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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,278

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,

v.

KENNETH E. RENNEKAMP, individually and doing
business as Radio Station W E M R,
Appellant.

BRIEF FOR APPELLANT AND APPENDIX

APPEAL FROM DECREE OF UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
AT CIVIL ACTION FILE No. 14,758

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Statement of Questions Involved.

1. Were the defendant and his employees subject to the provisions of the Fair Labor Standards Act?

2. Does the application of the Act to defendant violate his constitutional rights under the Fifth Amendment to the Constitution of the United States by reason of unwarranted, arbitrary, and unreasonable discrimination as between the operator of the smallest licensed radio station and the publisher of the smallest classification of newspapers?

3. Are the Findings of Fact and Conclusions of Law sustained by the evidence?

4. Notwithstanding any evidence presented by plaintiff, was the action moot and was there any substantial need for an injunction under the special circumstances here present?

Statement of the Case.

This action was brought by the Secretary of Labor for an injunction to restrain the defendant from violating the Fair Labor Standards Act of 1938 as amended (29 U. S. C. A. § 201 *et seq.*; 52 Stat. 1060). The Complaint alleged that defendant employed "approximately four (4) employees in and about the said place of business in the operation of Radio Station W E M R, including broadcasting in interstate commerce" (Paragraph IV), and charged the defendant with violation of the minimum wage, overtime, and record-keeping provisions of the Act.

The Complaint alleged violations in the broadest of terms and the defendant filed a Motion for Bill of Particulars. At the argument thereon before Chief District Judge Gourley on August 5, 1956, the Court pointed out that such a Motion was no longer provided for under the District Court Rules but urged plaintiff's counsel to furnish the requested information in order to expedite the action. Plaintiff's counsel then stated before the Court that the Complaint was based upon alleged violations with respect to five employees whose names were then furnished to the defendant. This is confirmed by an exchange of correspondence between counsel (Appendix, 25a-27a incl.). The defendant thereafter filed his Answer denying that he was engaged in interstate commerce, that he was covered by the Act, or that he had committed any of the violations alleged by the plaintiff.

The action was tried before the Honorable Joseph P. Willson, District Judge, without a jury, on January 16, 17, and 18, 1957. At the trial the plaintiff did not produce all of the five witnesses whose testimony the defendant expected to meet in accordance with the information he had

previously received from plaintiff's counsel at the argument before Judge Gourley, but plaintiff introduced the testimony of two persons, Mr. Dolnack and Mrs. Lesco, not previously named by the plaintiff, and the testimony of these two was received in evidence by the trial judge over objections by defendant (Appendix, 16a-17a, 19a).

Immediately after the taking of testimony was completed, the trial judge indicated from the bench that the injunction sought by the plaintiff would be granted, his reasons for the action, and directed plaintiff's counsel to submit Findings of Fact and Conclusions of Law (Transcript, pages 249 to 256 incl.). On January 25, 1957 Findings of Fact and Conclusions of Law were filed by the Court and an Injunction order was entered (Appendix, pages 6a-7a incl.).

On February 4, 1957 defendant filed Motion for New Trial; argument thereon was heard by Judge Willson on March 11; and on March 12, 1957 the Court filed a Memorandum Decision denying the Motion for New Trial (Appendix, 3a-5a incl.). This appeal followed.

The undisputed facts are that Radio Station W E M R had a power of only 100 Watts under license from the Federal Communications Commission (Third Finding of Fact); that its radius was 10 miles in any given direction (Appendix 20a); that the distance from Emporium, Pa., the location of Station W E M R, to the nearest state line was 51 miles (Transcript, page 221); that the routine operation of the Station, aside from occasional remote pickups, required only one man (Appendix, top of 9a, bottom 11a); that on October 20, 1956 the Radio Station was dismantled (Ninth Finding of Fact); that defendant surrendered his license for cancellation to the Federal Com-

munications Commission, and said license was cancelled by that government agency as shown by their letter of December 14, 1956 (Appendix, 22a).

In addition to the Questions of Law Involved in the case and to be dealt with in the argument for appellant, the credibility of the witnesses upon whom plaintiff relied is of primary importance and will be strongly argued by defendant, whose position is that even a cursory examination of the testimony will disclose it to be unworthy of belief; that the lower Court failed to weigh the testimony and reached a conclusion not warranted under the evidence presented.

ARGUMENT FOR APPELLANT.

1. Were the defendant and his employees subject to the provisions of the Fair Labor Standards Act?

The coverage of the Act with respect to the defendant and his employees turns on the extent to which they were in, or a part of, interstate commerce. There is no dispute that Radio Station W E M R operated with power of only 100 Watts (Third Finding of Fact). Furthermore, Rennekamp testified without contradiction (Transcript, page 152) that it is the smallest size station licensed by the Federal Communications Commission and that its radius was limited to 10 miles in any given direction (Transcript, page 218). The Court accepted this as a fact: "Mr. Levin: It will show this is a small station with a radius of 10 miles officially in either direction. The Court: I do not see any dispute about that." (Appendix, 20a). At page

221 of the Transcript the Court indicated that the distance from Emporium to the nearest state line is about 51 miles.

Paragraphs 4 and 5 of the Complaint alleged that the defendant's radio station was engaged in broadcasting in interstate commerce and that the employees were employed in interstate commerce. It is highly doubtful whether a station with a power of only 100 Watts and a radius of 10 miles, located at a distance of 51 miles from the nearest state line, is engaged in or plays any substantial part in interstate commerce. Counsel has been unable to find a single case wherein the applicability of the Fair Labor Standards Act to small radio stations was raised, contested, or directly in question.

The burden of proving that the defendant was engaged in interstate commerce was upon the plaintiff: Mitchell v. Joyce Agency, C. A. 7, 211 F. 2d, 241 (1954) and Mitchell v. Raines, D. C. Ga. 136 F. Supp. 5 (1955).

The facts referred to above do not support the plaintiff's position. However, plaintiff attempted to establish that the defendant and his employees were subject to the Fair Labor Standards Act by reason of the utilization of the Associated Press tickers, periodic news broadcasts, and the re-broadcast of occasional football games and a few baseball games which originated outside the state.

In its opinion denying defendant's motion for a new trial, the Court cites the case of Lorain Journal Company v. United States, 342 U. S. 143, as authority for the proposition that the defendant here was engaged in interstate commerce, quoting from that opinion the following: "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world

by agencies specially organized for that purpose is a part of interstate commerce * * *" (Appendix, 4a) and the Court asserts that the defendant's radio station "had in its office an Associated Press teletype machine, which was in operation on a 24-hour basis." None of the testimony indicates that Radio Station W E M R was operated on a 24-hour basis; all of the testimony is to the contrary.

The lower Court, in denying a new trial, further cites the fact that in addition to the disseminating of world-wide news, the station carried broadcast of baseball games which originated from outside Pennsylvania. The evidence in this connection is to be found solely in a deposition of Robert Curt Doelicke, at page 22, where he states that there were some Pittsburgh Steeler football games re-broadcast "through a pick-up" from outside the state and that at the end of the baseball season there were a few baseball games which were picked up, presumably on re-broadcast, but which originated outside the state. Nevertheless in the year round operations of a small local radio station, such re-broadcast of a few games from outside the state could hardly be construed as being a substantial part of interstate commerce.

The Lorain Journal case dealt with an entirely differeat situation from that which prevailed here and involved an entirely different Federal statute. The application of the interstate commerce yardstick in that case and under a different Act should not necessarily prevail under the present state of facts. In Brooklyn Bank v. O'Neil, 324 U. S. 697 (1945), a case arising under the Fair Labor Standards Act, the Supreme Court per Mr. Justice Reed, at page 713, states: "* * * The decision in the instant case is based on the legislative policy behind its enactment and issues aris-

ing under other acts having different legislative backgrounds are not conclusive in determining the legislative intent with respect to the Fair Labor Standards Act.* * *"

The owners of the Lorain Journal held a monopoly upon advertising in the City of Lorain, Ohio until such time as a new radio station was licensed by the Federal Government and began to compete with the Journal for advertising. In an effort to eliminate or hamper this competition, the owners of the Journal refused to accept advertising from those concerns which patronized the competing radio station. The Complaint in that case alleged, *inter alia*, that the defendants were engaged in a combination and conspiracy in restraint of interstate commerce. The opinion of Mr. Justice Burton indicates that the Lorain Journal had a circulation of over 13,000 copies. In a footnote at page 147, it was indicated that the competing Radio Station W E O L operated under power of half millivolt during the daytime and two millivolt at night; that its daytime pattern reached an area containing all or part of 20 counties and an estimated population of about 450,000. (An industry publication lists the power of Station W E O L as 1000 Watts or 10 times the power of W E M R).

In holding that both the Lorain Journal and Radio Station W E O L were in interstate commerce, the Court, first of all, was seeking to give to the Radio Station the protection of a Federal statute, to-wit, the Sherman Anti-Trust Law; and, secondly, the disparity of the coverage between the radio station in that case involving all or part of 20 counties and the limited coverage of 10 miles for Station W E M R is so great as to justify distinguishing the ruling in the Lorain case and excluding its application from the present facts involving W E M R.

A further distinguishing basis may be found in the following quotation from the Lorain opinion at page 152: "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and *profitable* reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce. * * *" (Emphasis supplied.) We have emphasized the word "profitable" for the reason that it distinguishes one phase of the operations of the Lorain Journal from the facts with respect to W E M R in this case. Lorain Journal, upon receiving news transmission, incorporated the news with advertising into its newspapers and *sold* such newspapers for *profit*. On the other hand, any dissemination of news on the part of the defendant through Radio Station W E M R was entirely free to the listening public within its 10-mile radius and constituted no more than a public service on the part of the defendant.

Only if a news broadcast were sponsored would any profit accrue to defendant, the sole source of revenue of Station W E M R being from advertising, primarily local, whereas a newspaper receives income not only from advertising but from the *sale* of newspapers to its readers.

It requires no extended argument that out-of-state advertisers have little occasion or use for a local station with a 10-mile radius when they can blanket the area by advertising upon the more powerful regional radio stations.

The absence from the Act of any specific reference to the radio broadcasting industry and the exemptions from the coverage of the Act expressly provided in Section 13 thereof (29 U. S. C. A., Sec. 213) are significant. Among the exemptions are subparagraph 2 which

relates to any employee employed by a retail or *service* establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located; subparagraph 11, which exempts any switchboard operator employed in a public telephone exchange which has not more than 750 stations; and subparagraph 8, which exempts from coverage of the Act "any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4000 the major part of which circulation is within the county where printed or published, or counties contiguous thereto * * *"

This last exemption in the Act of employees of small local newspapers obviously limits the applicability of the Lorain Journal decision so as to bar the application of that decision to the small newspapers of the type specified. If Congress recognized a basis for distinction under the Fair Labor Standards Act between larger newspapers such as the Lorain Journal and smaller ones such as those specified in Subparagraph 8, and this distinction was accepted as reasonable in the Lorain Journal case, then logically the declaration of the Supreme Court in the Lorain Journal case that Station W E O L was engaged in interstate commerce should likewise be limited to the larger radio stations and not applied to the very smallest type of radio station such as W E M R which, in radio broadcasting, is to the large stations what the exempted small newspapers are to the larger newspapers.

That Congress intended to exempt from the provisions of the Fair Labor Standards Act business activities which are primarily local in character is clear from the nature of

the exemptions set forth in Section 13 of the Act. This conclusion is further supported by the opinion of the Supreme Court in the case of Walling v. Jacksonville Paper Company, 317 U. S. 564 (1943), a case also arising under the Fair Labor Standards Act, wherein Mr. Justice Douglas, speaking for the Court, states at page 570: "* * * In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states * * *"

The same view is reiterated by the Supreme Court in Mabee v. White Plains Publishing Company, 327 U. S. 178 (1946) where Mr. Justice Douglas, speaking for the Court and referring to the exemption of small weekly newspapers from coverage under the Fair Labor Standards Act, states at page 184: "* * * and the exemption of small weeklies and semi-weeklies is not a 'deliberate and calculated device' to penalize a certain group of newspapers * * *. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises". In view of the absence from the Act of any specific reference to radio stations, and if radio stations are held to be covered upon the same basis as newspapers, i.e. receipt of news from the news services and dissemination of such news, the exemption provided in the Act for small local newspapers must be applied to the smallest local radio stations, which are in all respects on the same footing. This point will be further elaborated under the next heading.

In summary, defendant respectfully submits that the plaintiff failed to meet its burden of establishing that the operation of Station W E M R by the defendant and his three or four employees within a 10-mile radius of Em-

porium, Pa. was within the coverage of the Fair Labor Standards Act; and further, that the doctrine of the Lorain Journal case is not applicable to the instant case.

2. To construe the Fair Labor Standards Act as applicable to the defendant would result in violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States.

When Congress exempted from the coverage of the Fair Labor Standards Act, "any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4000 the major part of which circulation is within the county where printed or published or contiguous thereto * * *" (subsection 8 of Section 13, 29 U. S. C. A., sec. 213), it set up as a basis for distinction with respect to interstate commerce the differences between newspapers generally and small newspapers purely local in scope. If it was within the power of Congress to make such a distinction, and the Courts have so held in numerous cases (as in Sun Publishing Company v. Walling, 140 F. 2d 445) it is respectfully submitted that a similar distinction must be drawn between a purely local radio station such as W E M R, with a coverage limited to a 10-mile radius and power of 100 Watts, and larger stations with substantially wider reach and influence; and that, even if such larger radio stations are held to be in interstate commerce, the smallest type radio station, nevertheless, must be excluded from coverage of the Act.

This follows from a consideration of the relative positions of the small local newspapers expressly exempted in

the Act from its coverage and the smallest type of local radio station. Both are media of communication and it could only be on that basis that any question of coverage could arise in this instance. Both types of business are comparable from the aspects of limited number of employees, limited number of readers or listeners, limited area of coverage, limited effectiveness from an advertiser's viewpoint, limited gross income and, in fact, they compete among themselves for advertising to the same extent as small weekly, semi-weekly, or daily newspapers would compete among themselves. In view of these realities, there would appear to be no valid legal basis for treating the smallest type of radio station differently from small weekly, semi-weekly, or daily newspapers specifically exempted from coverage, especially since the Court in the Lorain Journal appears to bracket newspapers and radio stations together by reason of their utilization of news services.

The Fifth Amendment to the Constitution of the United States guarantees that "No person shall be deprived of life, liberty or property, without due process of law * * *" The action of the lower Court in holding that the defendant and Radio Station W E M R were covered by the Act deprives the defendant of his property right in the operation and utilization of the said radio station and deprives him of the incidents of property ownership. Furthermore, if, under the injunction issued in this case, the defendant were subsequently to be charged with contempt of Court for violation of the injunction, any punishment imposed could well constitute a deprivation of his liberty without due process of law.

The effect of the decision of the lower Court in this case is to hold that the exemption of small weekly, semi-weekly, and daily newspapers from coverage of the Act does not extend to small local radio stations. Such an interpretation is not really necessary or justified in view of the realities and the similarities hereinabove pointed out. However, if the decision of the lower Court in applying the Act to the defendant may be considered as a proper interpretation of the intent of the Congress, the defendant must question the constitutionality of the Act as it applies to him in this instance.

Even the case of Sun Publishing Company v. Walling, 140 F. 2nd 445 (1944), C. A. 6, relied on by the plaintiff and which held, as between the larger newspapers and the small ones, at page 448, that the classification was not improper and does not violate the Fifth Amendment by classifying newspapers in respect to frequency of issue and size of circulation, attached a condition that this would be true only so long as the classification appears *reasonable*. If the test of reasonableness is applied to the situation of the defendant and his small radio station, it is a logical conclusion under the circumstances that he is entitled to the same exemption from coverage as the small weekly, semi-weekly, or daily newspaper with which he would be in competition and in comparable position.

To deny him that exemption from coverage would constitute an unwarranted, arbitrary, and unreasonable discrimination as between him and the smaller classification of newspapers: and if it be said that Congress so intended in enacting the Fair Labor Standards Act, the Act must be construed as unconstitutional in this instance. But, since it is the duty of the Courts to interpret legislative enactments in

such a manner, as far as possible, as to uphold their constitutionality, it is possible and logical for this Court to rule that Congress intended to do that which was not violative of the constitutional rights of any individual and what was reasonable and logical; that, therefore, in exempting small weekly, semi-weekly, and daily newspapers from the coverage of the Act, Congress intended to exempt businesses falling within the same general classification, scope and significance, such as the smallest type of radio stations.

In the absence of any valid basis for distinction between the smallest type of local radio station and the smallest newspapers, the application of the Act to the defendant in this instance, as operator of a small local radio station, constitutes an unwarranted, unreasonable, and injurious discrimination against him and others similarly situated. It is true that the Fifth Amendment differs from the Fourteenth Amendment in that the former does not contain a clause guaranteeing to an individual the equal protection of the law but, on this score, defendant respectfully commends to the consideration of this Court the statement of Mr. Chief Justice Warren in the case of Bolling *et al.* v. Sharpe *et al.*, 347 U. S. 497 (1954), relating to the Fifth Amendment and involving segregation in the schools of the District of Columbia. At page 499 the chief justice, speaking for the Court, holds as follows: "• • • The Fifth Amendment which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideals of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due

process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable is to be violative of due process of law * * *"

The application of the Fair Labor Standards Act to defendant under the circumstances of this case constitutes a discrimination so unjustifiable as to violate the due process of law guaranteed to him under the Fifth Amendment.

3. The Findings of Fact and Conclusions of Law are not sustained by the evidence.

This phase of the argument will be discussed in two parts: first, with reference to the allegations of violation of the Minimum Wage & Maximum Hours provisions of the Fair Labor Standards Act; and, secondly, with respect to the alleged violations of the record-keeping provisions of the Act and of the Regulations promulgated by the Wage & Hours Administration under the Secretary of Labor.

The granting of an injunction in this case is a travesty of justice and due process of law. The lower Court reached its decision immediately after the taking of testimony was completed, without taking time to evaluate the evidence, in spite of specific circumstances pointed out by defendant's counsel as casting grave doubts upon the merits of the plaintiff's case.

The trial judge reiterated several times that the injunction was justified by the "credible" testimony produced by the plaintiff, but even a cursory examination of the testimony will disclose that the Court was led astray and that the Findings of Fact and Conclusions of Law are based

upon testimony so contradictory, inconsistent, irresponsible, and palpably false as to destroy the case made by the plaintiff and to negative the credibility of plaintiff's witnesses.

In its Memorandum Decision refusing a new trial the lower Court states (Appendix, 5a) "In order to pay its way the employees were required to sell advertising * * *." In the Fifth Finding of Fact, the Court finds that "defendant employed numerous employees * * *" and "that these employees * * * performed such duties as * * * sale of advertising for defendant's radio station." With respect to the use by the Court of the word "numerous", paragraph IV of the Complaint alleged that "defendant employed and is employing approximately four (4) employees * * *." Furthermore, plaintiff's own witnesses conceded that, except for special events broadcast from outside the studio in a relatively few instances, Station W E M R could be operated and kept on the air by one man, a combination announcer-engineer (Appendix, 9a and 11a).

As to the number of employees who engaged in selling advertising, the Fifth Finding of Fact is completely nullified by the testimony of plaintiff's main witness, Robert Curt Doelicke, who testified by deposition. He was the manager during the greater period of time involved in this proceeding and claimed to have spent substantial periods of uncompensated time in selling advertising. On the matter of other employees selling advertising, he testified on direct examination "but they never did sell any * * *" (Appendix, 7a).

Although another witness, Agnello, testified as part of the plaintiff's case that he made some attempt at selling

advertising during a period after Doelicke's employment had terminated, he (Agnello) stated, and plaintiff conceded, he was paid for the time involved from February to October 1956 (Transcript, middle page 96), notwithstanding that his testimony is unclear with respect to a limited period before February 1956.

The lower Court further states in the Memorandum Decision "The defendant's testimony and his other evidence simply did not overcome the credible testimony offered by the employees on behalf of the government * * *" (Appendix, 5a). Let us, therefore, examine the "credible" testimony which so impressed the lower Court.

Plaintiff's case is built mainly on the testimony of Robert Curt Doelicke and Albert P. Burton. Doelicke was announcer-manager of Station W E M R for a substantial period of time and alleged that, although he was paid for forty-eight hours every week, he worked as much as twelve hours extra each and every week selling advertising for the Station and was not paid for the selling time. Doelicke testified unequivocally that the time he allegedly spent in selling was in the *afternoons*, five days a week (Appendix, 7a to 8a) yet Burton, the other main witness for the plaintiff, testified that Doelicke did his selling in the *mornings*, after a short stop at the Station at about 9:00 A. M. (Appendix, 15a-16a).

Doelicke and Burton contradict each other in another phase of their testimony. Doelicke, in one of his answers makes quite a point of a lack of transportation to get to and from the Station and refers to the "time consuming effort" to get back and forth (Appendix, 8a). Nowhere in his testimony does Doelicke ever indicate that Burton was

providing him with transportation yet Burton testified in detail that he allegedly drove Doelicke "almost continually" for "possibly three months" (Appendix, 12a).

Another illuminating but unbelievable bit of testimony from Burton, relating to the time allegedly spent by him driving Doelicke about, appears in the Appendix at 12a, where Burton testifies that not only did Doelicke require the witness to drive him around, but led him to believe that his compensation for the driving would be his standard rate as engineer-announcer. Further, Burton testified that even though he was never paid for the time allegedly spent in transporting Doelicke, he never made any complaint to Rennekamp about it (Appendix, top and bottom 14a).

But, in addition to the foregoing discrepancies in the testimony of plaintiff's two main witnesses, Burton deliberately and openly *lied*, without affecting his position as a "credible" witness in the eyes of the trial judge. Burton's lies were not with respect to a minor matter but went to the very heart of the case, to-wit, whether the defendant required his employees to work hours in excess of the maximum at less than the applicable hourly minimum rates, or without compensation.

On direct examination, after testifying that he was paid at the correct rate for his scheduled forty-five hours per week, Burton testified that he worked hours in excess of forty-five doing remote broadcasts (Appendix, 10a). He testified also in that connection that he did request record shows three nights a week, at first from 9:00 to 10:00 P. M., and, later, from 9:00 to 11:00 P. M., in addition to his regular work schedule; that these request shows began in December 1954 and ran for three or four months; that

these hours were not shown on time sheets submitted to Mr. Rennekamp, and that he was not paid overtime for these request shows (Appendix, 10a-11a).

On cross examination, Burton identified Exhibit No. 1 as fifteen pages of time sheets made out by him and on which he received payment. He was then shown the time sheets for the period from December 1954 to February 19, 1955 and *admitted being paid for the record shows he did during that period* (Appendix, 13a-14a).

That admission also applies to the remote broadcasts which Burton claimed he took part in. On page 19 of the Transcript he refers to a remote broadcast which originated at the Sons of Italy hall on Saturday nights and a remote broadcast on one occasion from the Knights of Columbus, also on a Saturday night. At page 42 of the Transcript, on cross examination, he was asked about these special broadcasts on Saturday nights and whether they were included in the period from 6:30 to 11:15 and he answered in the affirmative. According to the testimony of plaintiff's own employee, Suiter, at page 129 of the Transcript, Burton was employed at Station W E M R between November 1954 and May of 1955. At page 21 of the Transcript there is an indication that Burton began these special broadcasts in the beginning of his employment where he refers to a high school football game on the first day he worked at the Station. He was then asked about the request shows and indicated that he worked in those three nights a week and that in relation to the commencement of his employment by the defendant, the request shows began about six weeks afterwards. A reference to the time sheets introduced into evidence as Exhibit No. 1 will show that Burton was paid for Saturday evenings involved in the special or remote broadcasts.

Burton was asked whether he had read a provision on the back of the time sheets upon which he and the other employees reported their hours worked and which indicated that written approval must be obtained from the station manager before the employee would be authorized to work hours different from the schedule. His answer was that he had read the provision, that he never had received written approval for overtime from Doelicke, that "everything was verbal" (Appendix, 14a).

Another witness for the plaintiff was George E. Dolnack Jr. who was employed during the period from November 1954 to May 1955 as a combination man, engineer-announcer (Transcript, page 50). His testimony was objected to for the reason that his name was not listed by the plaintiff among the names which plaintiff's counsel submitted to defendant at a hearing before Chief District Judge Gourley on August 5, 1956 in connection with defendant's Motion for Bill of Particulars. The Court overruled the objection and admitted his testimony (Appendix, 16a-17a). Further comment on this action of the Court will be made at a later point in this argument.

On page 53 of the Transcript Dolnack testified that he assisted in the remote broadcasts referred to by Burton and alternated evenings with Burton on the request record shows. It is submitted that the time sheets upon which Dolnack was paid and which are in evidence as Defendant's Exhibit No. 2 will indicate that Dolnack also was paid for the remote broadcasts and the request record shows for which he claimed he had not been compensated.

In the Seventh Finding of Fact the lower Court found that employees "frequently and repeatedly worked longer

hours each work week than those specified by Section 7 of the Act and *never* received excess additional compensation for such excess hours" (emphasis added). Aside from the question of credibility of plaintiff's witnesses as it affects the Seventh and other Findings of Fact generally, the use of the word "never" is controverted by plaintiff's own witnesses. Doelicke testified that on one occasion he was paid $10.00 extra (Appendix, 8a-9a). Dolnack testified that on one occasion he submitted overtime on his time sheet and was paid for it (Appendix, 17a). Norman W. Suiter, an investigator for the Wage and Hour Division of the U. S. Department of Labor, testifying for the plaintiff, indicated on direct examination that on a particular occasion in connection with a football game overtime was paid for six extra hours (Appendix, 19a).

Reference to Mr. Suiter brings up a matter in connection with a part of his testimony and the testimony of George E. Dolnack Jr. and Betty Lesco involving rulings by the Court. In the matter of Suiter, he was permitted, over objection by defendant, to testify as to transcript of certain logs. In rebuttal, on direct examination, he was not asked who made the transcripts but, in view of his testimony in plaintiff's case in chief that he made certain transcriptions, it was fair to assume that his rebuttal testimony related to his own transcriptions. On cross examination it became immediately apparent that the transcriptions were not made by him or in his presence, and that he could not vouch for their accuracy. The Court overruled objections and admitted them in evidence (Transcript, pages 246 to 249). Defendant submits that the Court erred in its ruling.

After the Complaint was filed in this action, setting forth the customary general allegations, defendant filed a

Motion for a Bill of Particulars. This came before Chief District Judge Gourley on August 5, 1956. The matter has already been referred to in the Statement of the Case, *supra*. At that time, at Judge Gourley's urging, counsel for the plaintiff supplied the information desired by the defendant and set forth the names of five employees upon whose testimony plaintiff would rely at the trial of the case to establish the alleged violations. This occasion is confirmed by an exchange of correspondence between counsel for the parties as shown in the Appendix at 25a-27a.

The names of George E. Dolnack Jr. and Betty Lesco were not included in the list of five names furnished by plaintiff's counsel to the defendant on that occasion yet, at the trial, their testimony was offered in evidence and admitted over the objections of the defendant (Appendix, 16a-17a, 19a). These rulings were obviously prejudicial to the defendant since the defendant had no prior notice of their intended appearance and no opportunity to make the proper advance preparation to meet their testimony. In view of the ruling of the Court admitting the testimony of these witnesses, the defendant made such efforts as he could on the spur of the moment to cross examine and controvert the testimony but it can be readily appreciated that a defendant is handicapped under those conditions; and it is respectfully submitted that the lower Court erred in admitting the testimony of these two witnesses.

Returning to the matter of the "credibility" of plaintiff's witnesses and the weight to be given to their testimony, it is a striking fact that although practically all of plaintiff's witnesses claimed they were required to work extra hours without being compensated, each ad-

mitted that they had never made any complaint to or demand upon Rennekamp at any time regarding overtime except in the case of Doelicke (Appendix, 9a, top & bottom 14a, Transcript page 59). Doelicke claimed to have done so when his employment was about to terminate (after he had sought to buy the Station from Rennekamp and been refused) (From Doelicke's deposition, pages 109-110).

It is particularly significant that plaintiff's main witness, Doelicke, testified on direct examination in positive terms that he worked each and every week in excess of sixty hours but had no shred of any record and kept no tabulation of any kind. (Appendix, 9a, Doelicke's deposition, page 423).

It is on false, contradictory, improbable, obviously biased testimony such as related above that the lower Court pinned the label of credibility and justifies an injunction which is a blemish upon the record of a reputable business man and an honorable member of the bar.

The explanation for the circumstances which led to the present action is to be found in the testimony of Dolnack that he was told by Doelicke to make a time sheet out in a particular way to avoid questioning by Rennekamp as to the reason for two or more men being on duty at this one-man station at a particular time and to conceal from Rennekamp that there was overlapping going on (Appendix, 18a). This testimony makes it clear that Rennekamp was the victim of a conspiracy of concealment by a manager upon whom he had a right to rely and employees who owed him a duty of good faith. These indignities have been aided and abetted by an overzealous government

bureau, and all of them together have imposed upon the lower Court. It is respectfully submitted that the lower Court erred in reaching a hasty and unwarranted conclusion that plaintiff was entitled to an injunction against the defendant upon the evidence which was presented.

In reviewing the trial record, a serious question arises as to whether Doelicke's entire deposition was properly before the lower Court and whether a new trial is not required because of the procedure followed. The deposition was not read into the record at the trial but was offered in bulk (Transcript page 123). At the time the depositions were taken in New York City in advance of the trial, there were numerous objections entered of record on the part of the defendant and a motion made to strike out Doelicke's testimony entirely. These objections and the motion to strike were not ruled upon by the Court at the trial below (Transcript, p. 123) and have not been ruled upon by any judge to date. While defendant would prefer to have this case decided on the merits, the failure to rule on the objections and on the motion to strike certainly constitutes a serious defect in the proceedings.

At this point, it is appropriate to discuss the alleged violations of the record-keeping provisions of the Act and the Regulations promulgated thereunder. The Eighth Finding of Fact states that the defendant kept inaccurate records and that he instructed his employees directly or through the station manager to show a specified scheduled number of hours each week, etc. This Finding of Fact is completely nullified by the testimony in plaintiff's own case, previously referred to above, which was given by Dolnack and is quoted at page 18a of the Appendix indicating that the instructions allegedly given to Dolnack

by the manager, Doelicke, regarding the listing of hours worked, were for the deliberate purpose of concealing the facts from Rennekamp and the testimony discloses that the witness, Dolnack, joined in concealing the situation, all of which negatives any instructions from Rennekamp directly or indirectly to show an incorrect record. It is obvious that if the incorrect records connived at between the manager and the employee were being so prepared at the instructions of Rennekamp, there would have been no reason whatever for concealment. That plaintiff's own witnesses testified to the concealment directly contradicts the Eighth Finding of Fact.

The Sixth and Seventh Conclusions of Law deal with the same matter. The Court states therein that the defendant cannot escape the duty of keeping records by delegating it to others and refers to a "personal non-delegable duty * * * to inquire into the conditions prevailing in his business and he is not relieved of this duty because the extent of his business may preclude his personal supervision and compel reliance on subordinates."

The Sixth Conclusion of Law also contains the statement that "the scheduled hours shown on time sheets signed and submitted by employees to defendant's office in Pittsburgh cannot be considered adequate and accurate records where the employer knew or should have known that they did not reflect the actual hours worked." It has already been demonstrated, from the above quoted testimony of plaintiff's witness, Dolnack, that the defendant, as the employer, did not know that the records did not reflect the actual hours worked because, admittedly, Doelicke, Dolnack, and the other employees made a determined effort, by the time records which they were submitting, to conceal irregularities from Rennekamp (Appendix, 18a).

Plaintiff succeeded in selling the trial Court upon the idea that a perfectly normal and proper desire on the part of Rennekamp to put the operation of Station W E M R on a profitable basis (never reached) by keeping expenses down, was intended as a violation of the Fair Labor Standards Act. Much also was made by the plaintiff of the fact that Rennekamp did not personally participate on a day to day basis in on-the-scene operation of Station W E M R, a requirement which, if it had been in effect in this country in earlier years, would have prevented the economic growth and development of the country and left us in the days of the horse and buggy and the small owner operated businesses.

The erroneous nature of the conclusion of the Court on this phase of the case is further demonstrated by the uncontradicted evidence given by Rennekamp in the form of a letter which he sent to his manager, Doelicke, under date of October 12, 1954 within the first few months of Doelicke's employment. This letter is in evidence at pages 215 to 216 of the Transcript and, after explaining the manner in which time records should be filled out by the employees and the necessity for accuracy, he states "We must have correct time records even if we are required to operate the station less hours per day * * *" (Appendix, 22a). That letter constitutes definite instruction from Rennekamp authorizing the curtailment of hours of operation if necessary in order to comply with the legal requirements as well as to keep the expenses down. The necessity for keeping the expenses down is emphasized by his testimony at page 217 of the Transcript indicating that the average income of the station was $450.00 per month as against an average monthly payroll of $700.00 per month.

The reference in the Sixth Conclusion of Law that the employer cannot escape the duty of keeping records by delegating it to others, if literally interpreted, is unreal. Few employers and no corporation can maintain records without delegating that duty to an agent. Where an employer relies on the individual employee to keep his own time and submit the same in writing to the employer, the result would normally be that the employee in his own self-interest would submit records upon which he would expect to be compensated in a proper manner; certainly that would be the case in the absence of any coercion on the part of the employer and there is not a scintilla of evidence of any coercion exercised by Rennekamp.

Referring now to the Regulations of the Wage & Hour Administrator regarding the keeping of records, we would quote from the official copy thereof as follows: "Section 516.1 Form of records. (a) *No particular order or form of records is prescribed by these regulations.* However, every employer who is subject to any of the provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as "the Act"), is required to maintain records containing the information and data required by the specific sections hereof" (italics added).

In the absence of any requirement of any particular type or form of record to be kept by an employer, there is no basis for any contention on the part of the plaintiff or the Court below that, as long as the required data is kept, the fact that it was kept or prepared by the employee himself, for whose benefit the Act can properly be assumed to have been intended, constitutes a violation of the record keeping provisions of the Act and Regulation. It follows that the first part of the Seventh Conclusion of Law that the de-

fendant failed to maintain the records of daily and weekly hours actually worked by the employees, is erroneous.

This is not an attempt to justify the keeping of inaccurate records, but we have here the situation where the evidence to support an allegation of inaccuracy in the records comes from employees who, without coercion of any sort, prepared and submitted the records to the defendant and were paid by the defendant on the basis of those records; and any inaccuracies are clearly due not to any instructions or desire on the part of the defendant, but to a conspiracy of concealment between the manager and the employees in question, upon whose testimony the plaintiff's case is based.

4. In view of the circumstances, the action was moot and there was no substantial need for an injunction.

Testifying as plaintiff's witness, James Agnello testified, on direct examination (Transcript, pages 87 and 96), that from February 1956 to the end of his service in October 1956 (when the station was dismantled), he was paid overtime for all hours worked in excess of forty per week (Appendix, 18a) and this was not disputed or questioned by plaintiff's counsel.

The record will show that the present action was filed June 22, 1956. The station was closed down and dismantled on October 20, 1956 as recognized in the Ninth Finding of Fact. The action was tried January 16, 17, and 18, 1957 and the trial judge made his ruling immediately after the testimony closed on January 18th, 1957. On plaintiff's own case there were no violations for practically a year preceding the Court's ruling; and three months before that the station had admittedly been dismantled and the license surrendered to the Federal Communications Commission.

On page 199 of the Transcript, the Court asked Rennekamp whether he still owned the land on which the station had been located. Rennekamp explained that the land had been owned by his wife and that she was even then in the process of selling the land to a neighbor. The Court uses the ownership of Rennekamp's wife, ignoring the sale pending, as part of the basis, in the Tenth Finding of Fact, for granting an injunction.

Nor is that all that is wrong with the Tenth Finding of Fact. Towards the end of the trial, counsel for the plaintiff sought to bolster his weak case by introducing the fact that Rennekamp was a stockholder and officer in a corporation which owned and operated a radio station at Oil City, Pa., W K R Z Incorporated, and was a part owner, albeit a silent one, in a small radio station at St. Mary's, Pa., Station W K B I, for the purpose of justifying an injunction in the present proceeding. As an officer of W K R Z Inc. Rennekamp had in Sept. 1954 signed a consent decree terminationg an action filed a year or more before that by the Secretary of Labor, based upon alleged violations under the Wages and Hours Act in connection with Station W K R Z. That decree, in accordance with the form prescribed by the Court rules, bound the corporation, its officers, agents etc.

At page 200 of the Transcript, on cross examination, Rennekamp was asked by plaintiff's counsel as to his ownership in W K B I and W K R Z Inc. On re-direct, defendant's counsel brought out that Rennekamp was a part owner in W K B I but had no part or control in its management; and defendant further sought to establish by stipulation with plaintiff's counsel, that plaintiff had recognized defendant's lack of responsibility for the operation of

WKBI by discontinuing, as to Rennekamp, an action brought against Rennekamp and Cary Simpson, as owners, alleging violations or irregularities under the Wages and Hours Act. Plaintiff's counsel refused, at first, to so stipulate, saying "I don't think it's relevant to the case" (page 202). The Court then stated: "It doesn't make any difference, it will have no bearing on the outcome of the case" and plaintiff's counsel repeated the same sentiment (bottom page 202 to top page 203, Transcript). Yet, contrary to these expressions by the Court and counsel for plaintiff, the Court in its Tenth Finding of Fact takes into account defendant's part ownership in WKBI as apparent basis for the injunction granted. At pages 236-238 of the Transcript, plaintiff's counsel again asks about WKBI, but at pages 241-242, he finally admitted that Rennekamp had no responsibility for WKBI, and that a prior action by plaintiff had been discontinued as to Rennekamp for that reason (Appendix, 20a-21a).

Exactly the same thing then occurred with reference to Rennekamp's signature as President of WKRZ Inc., in 1954, to the consent decree mentioned above. Again, the Court at page 203 of the Transcript says: "In the Court's mind neither one have any bearing on the case, neither one of them. Perhaps to make a complete record I will admit this one but it can't have any bearing on the case." Yet, in granting an injunction from the bench immediately after the testimony was concluded, in the course of an argument by defendant's counsel, the Court indicated that these matters were taken into consideration, saying, in justifying the injunction, "* * * This man is, of course, still in the radio business, broadcasting business * * *" (Transcript, bottom page 254), and, again, makes a finding in relation thereto, in the Tenth Finding of Fact.

Mr. Rennekamp's ownership of a half interest in W K B I without any participation or control should hav no bearing whatever in this proceeding, because this same plaintiff, the Secretary of Labor, absolved Rennekamp from any responsibility when, admittedly, it discontinued an action similar to this one as to Rennekamp because he had no part in its operation (Transcript, page 242, Appendix, 20a-21a). On the other hand, if his ownership interest in W K B I is considered in this case, Rennekamp is, in effect, being sued in this action, in part, upon the same cause of action which had previously been discontinued against him, and without an opportunity to prepare a defense.

The matter of the consent decree against W K R Z Inc. should have no place in this proceeding for the obvious reason that legally the defendants in the two proceedings are not the same. Even if we pass that technical reason, the fact that the consent decree against W K R Z Inc. bound the officers, agents, employees, etc. of that corporation, of which officers Rennekamp was one, argues that if Rennekamp was already under one injunction, there was no need whatsoever for another injunction against him in this proceeding, requiring the same things of him.

In American jurisprudence, an injunction has always been considered an extraordinary remedy, not to be hastily or lightly invoked. The granting of an injunction is not mandatory, but discretionary: Hecht Company v. Bowles, 321 U. S. 321 (1944), an action involving the Emergency Price Control Act.

The injunction is not to be used to punish past offenses, but only in a proper case to prevent wrongdoing in the future: Walling v. Gulf States Paper Corp. (C.

C. A.—5) 143 F. 2d 301, affirming 53 F. Supp. 619; Walling v. Panther Creek Mines Inc. (C. C. A.—7) 148 F. 2nd 604; Walling v. Halliburton Oil Wells Company (D. C. Cal.) 57 F. Supp. 408, affirmed 152 F. 2nd 622, affirmed 331 U. S. 17, 91 L. Ed. 1313, 67 S. Ct. 1056; Walling v. Associated Truck Lines Inc. (D. C.—Mich.) 57 F. Supp. 943.

The evidence offered by the plaintiff together with the admitted facts indicate that the following circumstances are present in this case:

(a) Defendant had ceased any alleged violations months before the commencement of this action.

(b) Station W E M R was dismantled in October 1956.

(c) Defendant subsequently surrendered his license for Station W E M R to the Federal Communications Commission and the Federal Communications Commission cancelled that license.

(d) Property on which the station had existed was in the process of being sold by defendant's wife at the time the action was being tried by the lower Court.

(e) To the extent that any possible basis or justification for an injunction exists, the defendant is already covered under the terms of the consent decree and the injunction entered in the matter involving Station W K R Z Inc.

Upon the basis of the foregoing circumstances, it is respectfully submitted that no need for an injunction has been established by the plaintiff in this proceeding and that, in view of the fact that the business involved in this proceeding is plainly out of existence, the action is moot.

Conclusion.

For the reasons hereinabove set forth at length, defendant respectfully submits to the Court that the judgment of the lower Court is in error and should be reversed and rendered for the defendant for the following reasons:

1. The Fair Labor Standards Act was not applicable to the employees of Station W E M R operated by the defendant.

2. The action of the lower Court in applying the Act and in granting an injunction violates the rights of the defendant under the Fifth Amendment to the Constitution of the United States.

3. The Findings of Fact and Conclusions of Law entered by the Court below are not sustained by credible evidence.

4. Under the circumstances here present, the need for an injunction was not established by the plaintiff and the action is moot.

Respectfully submitted,

DAVID R. LEVIN,
KENNETH E. RENNEKAMP,
Attorneys for Appellant.

APPENDIX.

Docket Entries.

1956

June 22 Complaint filed.

June 22 Summons issued.

June 27 Summons returned served.

July 14 Praecipe for appearance for counsel for defts. filed.

July 14 Notice of Motion and Motion for Bill of Particulars filed by the defendant.

Aug. 5 Hearing on Motion for Bill of Particulars begun before Gourley, J.

Aug. 5 Hearing concluded C. A. V.

Aug. 5 Hearing memo filed. (Order to be entered.)

Sept. 17 Order of Court entered directing Answer to be filed within 20 days from the date of this Order; the within proceeding is set for trial during the Non-Jury term of Court to commence November 12, 1956.

Oct. 6 Answer to Complaint filed by defendant.

Oct. 29 Notice to take Oral Depositions filed by Plaintiff.

Oct. 30 Motion *ex-parte* defendant to vacate plaintiff's Notice for Oral Depositions filed.

Nov. 1 Hearing on Petition for Restraining taking of Depositions by plaintiff, before Gourley, J.

Nov. 1 Hearing concluded. Hearing memo filed. (Court Reporter Helen Smith.)

Nov. 1 Petition filed and Order of Court entered directing Defendant's Motion *ex-parte* of October 30 and plaintiff's Notice of October 29, for Taking Oral Depositions; are hereby restrained, Parties to agree on a satisfactory date within ten (10) days from the date of this Order, failure to agree

1956	
	on Application of either Party the Court will set a date for the Taking of Deposition; Proceeding is fixed for trial during week of January 7, 1957. (Gourley, J.)
Dec. 26	Depositions of John H. Garlich and Robert Curt Doelicke, together with certain Exhibits, filed by plaintiff.
1957	
Jan. 16	Order of Court entered transferring Case from Non-Jury trial list of Gourley, J. to Judge Willson for trial and disposition.
Jan. 16	Non-Jury Trial opens before Willson, J.
Jan. 17	Trial continues.
Jan. 18	Trial continues.
Jan. 18	Trial concluded. Trial memo filed. (Findings of Fact and Conclusions of Law to be filed.)
Jan. 25	Findings of Fact and Conclusions of Law filed by Willson, J.
Jan. 25	Order entered permanently enjoining and restraining defendant, his agents, etc. from violating the Fair Labor Standards Act. (Willson, J.)
Jan. 25	Pursuant to Order entered, defendant, his agents, etc. are hereby permanently enjoined and restrained from violating the Fair Labor Standards Act.

JAMES H. WALLACE, JR.,
Clerk.

Feb. 4	Motion for New Trial filed by the defendant.
Mar. 11	Hearing on Motion for New Trial begun before Willson, J.

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Mar. 11 Hearing concluded. C. A. V.

Mar. 11 Hearing memo filed. (Rep. Helen Smith.)

Mar. 12 Memorandum decision on Motion for New Trial filed. The Motion of defendant Kenneth E. Rennekamp for a New Trial is denied. Wilson, J.

Mar. 14 Notice of Appeal filed by the attorney for the defendant.

Mar. 14 Bond for cost on Appeal in the amount of $250.00 filed.

Mar. 14 Copies mailed U. S. Clerk of Appeals; counsel for pltf. and letters to counsel and J. Willson.

Apr. 12 Transcript of Non-jury trial held Pgh. Jan. 16, 17, 18, 1957 before Willson, J., filed. (Erme M. Pock Reporter.)

June 6 Record on appeal mailed to Clerk, U. S. Court of Appeals and letters sent to counsel and Judge Willson.

Memorandum Decision on Motion for a New Trial.

(Filed March 12, 1957.)

This case was tried to the court, and at the conclusion of the trial, while on the bench, an oral decision was announced, granting plaintiff the relief as prayed for and directing plaintiff's counsel to submit proposed findings of fact and conclusions of law. These were submitted, and on January 25, 1957 the court adopted the findings and conclusions and directed they be filed. Defendant Kenneth E. Rennekamp has moved for a new trial. The parties have been heard at argument.

Defendant contends that plaintiff failed to produce sufficient evidence on which to base a finding that his employees were engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201, *et seq.* The fourth and fifth findings of fact are the basis for the second and third conclusions of law. The case of *Lorain Journal Co. v. United States*, 342 U. S. 143, is authority for rejecting this contention by defendant. The court says, page 151:

> "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce * * *"

Defendant's radio station WEMR had in its office an Associated Press teletype machine, which was in operation on a twenty four hour basis. World-wide news, which had been gathered by the Associated Press, was thus brought to the station and broadcast by the announcers in the Emporium area. In addition, from time to time broadcasts of baseball games which originated from out of Pennsylvania were transmitted over defendant's radio station to the local listeners in the Emporium area. It is thus apparent that defendant's employees came under the provisions of the Fair Labor Standards Act.

Defendant's main contention is, however, that the findings and conclusions are against the weight of the credible evidence. Defendant urges that he gave explicit instructions, prepared and directed the use of time cards, all with the intent and purpose that his employees at his radio station were to work only a limited number of hours. Defendant contends that if his employees, who are the witnesses relied upon by the government, did put in hours

over and beyond the work week as authorized by him, they did so without his knowledge and consent and contrary to his instructions. However, it should be recalled that defendant is a member of the bar, residing and practicing in Pittsburgh. The radio station involved was located at Emporium, in this district, approximately 150 miles from Pittsburgh. Defendant, under the evidence, but seldom visited the station. He directed the operation of it largely by telephone. It is apparent that one of the requirements to his manager and to his other employees was that the station must pay its own way. In order to pay its own way, the employees were required to sell advertising, write the script for the advertising, do the announcing on the air, prepare the bills and collect for the advertising and deposit the money in the bank at Emporium. The employees were either on a forty-five and one-half hour or forty-eight hour week. If, in sending their time cards to Pittsburgh, hours in excess of those authorized were shown, the employee simply did not get a check. From the testimony it was established that the employees did, in fact, work in excess of the time shown on the time cards or sheets, for which time they received no pay. The defendant's testimony and his other evidence simply did not overcome the credible testimony offered by the employees on behalf of the government.

Defendant contends also that the remedy sought, that is, the injunction, is too harsh and should not be imposed in this instance. The court cannot agree with this contention. It is believed that, under all of the evidence, the relief prayed for is justified. THEREFORE IT IS ORDERED

This 12th day of March, 1957, the motion of defendant Kenneth E. Rennekamp for a new trial is denied.

s JOSEPH P. WILLSON

Order.

(Filed January 25, 1957.)

And Now, this 25th day of January 1957, the above case having been heard on pleadings and proof in open Court and after argument of counsel, and it appearing that plaintiff is entitled to an injunction as prayed for, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendant, his agents, servants, employees, attorneys, and all persons acting or claiming to act in his behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Amendments of 1949, as amended (Act of October 26, 1949, c. 736, 63 Stat. 910, as amended August 12, 1955, 69 Stat. 711, U. S. C. Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act, in any of the following manners:

(1) The defendant shall not, contrary to Section 6 of the Act, employ any of his employees engaged in commerce or in the production of goods for commerce, as defined by the Act, at wage rates less than One Dollar ($1.00) an hour or any wages at a rate less than that which may hereafter be established as the applicable minimum by any amendments of the Act.

(2) The defendant shall not, contrary to Section 7 of the Act, employ any of his employees engaged in commerce or in the production of goods for commerce, as defined by the Act, for a workweek longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed.

(3) The defendant shall not fail to make, keep, and preserve records of his employees, and of the wages, hours, and other conditions and practices of employment maintained by him, as prescribed by the regulations of the Administrator of the Wage and Hour Division, United States Department of Labor, issued and from time to time amended, pursuant to Section 11(c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

By the Court:

JOSEPH P. WILLSON,
United States District Judge.

Excerpts From Testimony.

From deposition of Robert Curt Doelicke:

Direct Examination:

At page 19.

"A. • • • and it was also said to me the other employees should sell, too—they'll receive their 15 per cent, but they never did sell any.

Q. Did you actually put in any time selling?

A. Oh, I had to. It's the only way I could—

Q. How many hours a day would you put in?

A. Well, I never kept track of how many hours.

Q. To your best recollection?

A. I would spend a whole afternoon downtown.

• • •

Q. How many days a week would you put into your selling effort?

A. The business days, five days."

Cross Examination:

Bottom page 72 to middle page 73.

"A. • • • In the afternoon I would spend at least three or four hours downtown with clients.

Q. You say you were doing what downtown?

A. Speaking—you know, visiting the business people and trying to sign them up—appointments, and so on.

• • •

A. (Continued to basic question.) Yes. Now we had no transportation to get to and from the station. The station was way out away from the town and there was that time-consumed effort, too, to get out there and get back all the time."

Doelicke's deposition, cross examination, Page 76:

"Q. You want us then to understand that every day in the week from the time you were employed at WEMR until the time you left you spent every afternoon downtown about three hours in the afternoon selling advertising on WEMR, is that right?

A. "Selling" is a big term. I was meeting the business people downtown.

Q. Every afternoon?

A. I was down there every afternoon, yes."

Direct Examination:

Page 23 of depositions.

"Q. Did your compensation of $130.00 every two weeks ever vary during the period of your employment? Did you ever receive more than $130.00? Let me put it that way.

A. There may have been one spot when I first started to work in E. M. R. where I may have got

$10.00 extra—I vaguely recall something there—but there was only that one instance* * *"

* * *

At page 60.

"Q. One man at a particular hour could operate that station?

A. Yes."

* * *

Doelicke's deposition, cross examination, page 42.

"Q. Have you any record whatever of the hours you actually worked for WEMR between April 1954 worksheet that was mailed to Mr. Rennekamp.

and the time you ceased working for that station?

A. Only the records I made out on the 2 week worksheet that was mailed to Mr. Rennekamp.

* * *

Q. Well, aside from the worksheets that you sent in to Mr. Rennekamp and the program logs that you have referred to, have you any other records—

A. No, sir.

Q. —of the hours that you worked between April '54 and the end of your work for WEMR?

A. No, sir."

Doelicke's deposition, cross examination, pages 109-110.

"Q. You never made any demand on Rennekamp for additional payment?

A. No."

From testimony of Albert P. Burton:

Direct Examination:

Transcript.

Page 18.

"Q. In what connection did you work hours in excess of 45?

A. Well, remote broadcast for one thing.

Q. Remote broadcasts. Will you please explain to the Court just what a remote broadcast means?

A. Well, broadcasts originating at a point other than the studio and/or studio transmitter site."

Transcript.

Page 21.

"Q. Were there any request shows in which you participated?

A. There was a request show in which I participated. It started at nine o'clock in the evenings and ran until ten and then due to the volume of requests we eventually ran it all the way up until the eleven o'clock news.

Q. How frequently did you participate in these request shows?

A. Three nights a week, as I recall it was every other night of my work week.

• • •

Q. Was that in addition to your regular work day that was scheduled?

A. Yes.

• • •

Pages 21 to 22.

Q. And when did these request shows start in relation to your commencement of employment with the defendant company?

• • •

A. In December.

Q. In December of 1954?

A. Yes.

Q. How long did these request shows run?

• • •

A. Three months, four months perhaps.

• • •

Q. Were you paid any *extra overtime for such* hours of work?

A. No.

Q. Were these hours of work shown on any time sheets that were submittted to Mr. Rennekamp?

A. They were not."

Cross Examination of Albert P. Burton:

Transcript.

Page 28.

"Q. But aside from the request shows or during the period prior to those request shows that station is a one man operation, isn't it?

• • •

A. In a strictly routine sense, yes, • • •"

Transcript.

Bottom page 29 to top of page 30.

"Q. Now you have testified about the services of Mr. Doelnicke. (Counsel's note: this should be spell-

ed Doelicke as distinguished from another witness, Dolnack.) Did you ever accompany him on any of his duties?

A. Yes, I did, quite a lot.

Q. Where to?

A. To the various accounts which he was trying to sell radio time to.

Q. What would be the reason for your accompanying him, if any?

A. To, well, I drove him to his calls.

• • •

Q. How many times would you say you accompanied Doelnicke (Doelicke)?

• • •

A. When I first started and for the first possibly three months that I worked almost continuously."

Pages 31-32.

"Q. When you were first employed by Doelnicke (Doelicke) you say that you were given to understand that you were to drive him around, is that right?

A. That's right.

• • •

Q. How much were you to get for the services of driving him around, in compensation?

A. My regular pay.

Q. You mean your standard pay as an engineer-announcer?

A. That's right."

• • •

Transcript.

Page 34.

"Q. Did you at any time have any dealings with Mr. Rennekamp personally?

A. No."

• • •

Transcript.

Pages 36-37.

(After identifying Exhibit No. 1 as 15 pages of Time Sheets made out by him and on which he received payment.)

"Q. You stated that you were doing these record shows between nine and eleven. I think nine to ten?

A. Nine to ten and then nine to eleven.

• • •

Q. If the record shows took place during that month, during the hours from nine to eleven and if you were paid during December from 5:15 to 11:15, you were paid for your record shows in December, were you not?

A. Yes.

• • •

Q. I show you the following sheet which covers the period from December 31, 1954 to January 13, 1955 and isn't it true that you reported time from 5:15 to 11:15 during that period and were paid for those hours?

A. That's right.

Q. Isn't the same thing true from January 14, 1955 down to February the 19th, 1955?

A. Yes.

• • •

Q. And you were paid for that period?

A. That's right."

• • •

Page 40.

"Q. Did you ever make any complaint to Rennekamp about it? (Referring to driving Doelicke about.)

A. No."

• • •

"Q. I show you on the back of each of these time sheets, which I assume you have read?

A. Yes.

Q. This statement, 'Employee is authorized to work only those hours shown on time sheet and any changes in work schedule must be approved in writing by station manager.' Did you ever receive from Doelnicke (Doelicke) any written approval for any overtime hours or anything like that?

A. Everything was verbal."

• • •

Transcript.

Page 41.

"Q. And you never made any demand on Mr. Rennekamp who signed your checks, is that right?

A. That's right.

Mr. Levin: We offer in evidence Defendant's Exhibit 1.

The Court: Any objection.

Mr. Weiner: No objection.

The Court: All right, they are admitted."

• • •

Re-direct Examination of Burton:

Transcript.

Pages 43-44.

"Q. Now, did you during any time of the work week, January 6th, 1955, come into work before twelve noon, any of those work days?

A. Almost always because I would pick Mr. Doelnicke (Doelicke) up with my automobile before or no later than nine o'clock.

Q. When would you report then to the broadcasting station?

A. We would drive to the station and he would perform any duties that he had to perform there, thirty, sixty minutes, and then he would go out and make some calls."

• • •

Re-cross Examination of Burton:

Transcript.

Pages 45-46.

"Q. What would you then do if you came in at nine o'clock?

A. I brought Doelnicke (Doelicke) to the station and then took him from the station on his round of calls.

• • •

Q. Did you accompany him after you took him to town? Did you stay with him on every call he made?

A. Yes."

• • •

Page 48.

"Q. Not only did you take him back and forth, you say you took him back to town to sell and you waited while he sold?

A. That's right.

Q. And took him from customer to customer?

A. Absolutely.

By the Court:

Q. Did you go inside with him and help put on the sales talk?

A. Yes, I went inside to meet the people that he called upon."

• • •

From testimony of George E. Dolnack, Jr.

Transcript.

Pages 51-52:

Mr. Levin: Just one moment, if the Court please. At this point we note an objection to testimony of the witness on the grounds that when Mr. Weiner disclosed to us before Judge Gourley the names of the employees as to whom violations were claimed, the names that he gave us and the dates did not include this witness.

• • •

Mr. Weiner: He was in Florida.

A. No, sir, Syracuse.

Mr. Weiner: Our understanding was that you were in Florida at that time. We subsequently learned he was in Syracuse. On that basis, we asked him to come to testify. We didn't know he would be available as a witness.

The Court: It must be routine. As a matter of fact, I don't see, Mr. Levin, how it's any great surprise that this man would testify when the other man testified.

Mr. Levin: We don't know whether he was going to testify or not. We don't know whether we have his records. We prepared for five. We don't know about him. That's the problem.

The Court: We will see. We will permit you to go ahead.

Mr. Levin: Your Honor will note our objection."

• • •

Cross Examination:

Transcript.

Page 57.

"Q. I think you said before when I interrupted, unintentionally, that the one occasion after the station went back on the air, you submitted on your time sheet overtime, is that correct?

A. That's correct.

Q. And you were paid when you submitted it?

A. That's correct."

• • •

Transcript.

Page 60.

"Q. You were paid by Mr. Rennekamp on the basis of these time records?

A. Yes, I was.

• • •

Q. These are not in order, Mr. Dolnack, but I am going to see if you can't refer to this. On top is one showing time from February 22, 1955 to February 26, 1955. That particular occasion shows you worked from 6:30 P. M. to 11:15, right?

A. It shows on the time record I worked those hours but actually I didn't work those hours. I was told by Mr. Doelnicke (Doelicke) to put this record of time on the time sheet in order to show Mr. Rennekamp that none of the employees' time at the radio station would overlap and maybe Mr. Rennekamp would question the reason why two or more men would be on duty at the radio station during that time.

Q. So Mr. Doelnicke (Doelicke) then instructed you to make out the record this way, so Mr. Rennekamp wouldn't know there was overlapping going on, is that correct?

A. That's correct."

• • •

James Agnello—plaintiffs' witness.

Direct Examination:

Transcript.

P. 87.

"Q. • • • We understand perfectly from the period after February of what year was it after February?

A. '56.

Q. 56.

A. I was paid overtime.

• • •

Q. For the hours you worked over forty?

A. Yes, sir."

Objection to testimony of Betty Lesco.

Transcript.

Page 102.

Mr. Levin: Just a moment. May I interject at this time an objection to the testimony of this witness for the reason that she is not included among those whose names were furnished by counsel for the plaintiff to us in Judge Gourley's courtroom as being employees whose hours were worked in excess of the maximum and who were not paid, that we are surprised by any testimony from this witness at this time in this proceeding.

The Court: Well, she has been an employee of this company, as I understand it so I am going to hear it. Objection overruled. Go ahead.

Mr. Levin: Will your Honor note us an exception?"

* * *

From testimony of Norman W. Suiter, witness for Plaintiff.

Direct Examination:

Page 128.

"A. * * * There is one exception for the week ending September 24, there is a notation of six hours having been paid, evidently a football game at six hours at $1.875 or a total of $11.25 * * *"

* * *

DISCUSSION.

Transcript.

Page 220.

Discussion between counsel and the Court.

"Mr. Levin: It will show this is a small station with a radius of 10 miles officially in either direction.

The Court: I don't see any dispute about that • • •"

• • •

Testimony of Kenneth E. Rennekamp.

Transcript.

Page 200.

"By the Court:

Q. Did you say you have an interest in WKBI in St. Mary's?

A. I have 50% per cent.

Q. Also in Oil City?

A. I am a stockholder in Oil City Corporation, yes, sir.

• • •

Pages 202-203.

Mr. Levin:

"Q. Just a minute. You take no active part in St. Mary's at all?

A. I am what is known as a silent partner.

Mr. Levin: I'd like the record to show—

Mr. Weiner: The record so states, he testified to that effect.

Mr. Levin: —that an action involving the St. Mary's station was discontinued by your office as to him. Will you so stipulate?

Mr. Weiner: No, I will not stipulate to anything. I don't think it's relevant to the case.

The Court: It doesn't make any difference, it will have no bearing on the outcome of this case."

• • •

Transcript.

Page 242.

"Mr. Weiner: I will state for the record the action was discontinued as to Mr. Rennekamp and for the reason that he was a silent partner and had, as we understood, no active participation in the operation of that station."

• • •

Remarks of the Court.

Transcript.

Page 208.

"The Court: He must look after what's going on up there. If he leaves it to these young fellows and they go out and work extra odd hours, night time, day time, I think he's got to be responsible for it in this case."

• • •

Transcript.

Page 216.

Testimony of Rennekamp.

Excerpt from letter to Doelicke, dated October 12, 1954.

"* * * We must have correct time records even if we are required to operate the station less hours per day * * *"

* * *

Transcript.

Page 222.

From testimony of Kenneth E. Rennekamp.

Direct Examination:

"Q. I show you Defendant's Exhibit No. 7 and ask you if that is a communication from the Federal Communications Commission to you personally?

A. Yes, it is.

Q. Will you read the contents of that communication, date and so forth?

A. It is from the Federal Communications Commission, Washington 25, D. C. December 14, 1956 * * * 'Dear Sir: In accordance with the letter from your Attorney, Vincent A. Pepper, dated November 28, 1956, your license (file No. BL-5311) which authorized a new standard broadcast station at Emporium, Pa. is hereby cancelled as of this date and call letters W. E. M. R. are deleted. Very truly yours, Mary Jane Morris, secretary. Copy to Welch, Mott, and Morgan, Attorneys.' "

* * *

Cross Examination of Rennekamp.

Transcript.

Pages 233-234.

"Q. You devoted seven minutes to WEMR in April and five minutes in May of 1954 on your way to Leominster, Massachusetts and back and you devoted no time during the whole period from October, 1954 to May of 1955. What prevented you from getting down to your station?

A. I was at the station in October of 1954 and the bad weather prevented me from getting to the station—

The Court: That doesn't mean anything. That is no excuse, Mr. Rennekamp. I drove that country three years every week end, 125 miles. If that's the only reason he's got, it's no answer, it's no defense.

• • •

A. There was no occasion to go down to the station as Mr. Doelnicke (Doelicke) was contacting me by phone and by mail.

By Mr. Levin:

Q. How often would you talk to Station WEMR in Emporium by phone on an average per week?

A. From one to three times a week.

Q. Didn't you also have correspondence when the occasion arose?

A. I had on an average of possibly from one to three letters a week."

• • •

Transcript.

Page 250.

From statement by the Court.

"• • • It's like any other civil case. It depends on the preponderance of the evidence and comparison and weight of testimony. That's all there is to it • • • but the weight of the testimony, these men he had up there and his manager particularly just simply put in more time and it seems to me he should have known it and he is bound by it, whether he did or did not know about it • • •"

• • •

Transcript.

Pages 251-252.

"Mr. Levin: I would point out to your Honor in the cross examination of Mr. Dolnack • • • and I think that is the crux of this whole situation, he said that Doelnicke (Doelicke) told him not to show that because he didn't want Rennekamp to find out that they had been working extra hours. I don't know if your Honor noted that statement.

Mr. Weiner: No, there wasn't anything about overtime. There was an overlap.

Mr. Levin: Whatever it was, they didn't want Rennekamp to find out about it.

The Court: I took that to be, they understood Rennekamp said to them, here you have got so many hours a week to work. That's all you report. If you work over that, don't let me know about it, but get advertising in and keep the station on the air.

Mr. Levin: I submit to your Honor that is not a fair assumption.

The Court: That's what the proof indicates to me, hearing all the proof * * *"

* * *

Letter from Defendant's Attorney to Plaintiff's Attorney.

DAVID R. LEVIN
ATTORNEY AT LAW
100 STANDARD LIFE BUILDING
Fourth Avenue and Smithfield Street
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Telephone:
GRant 1-1508

September 24, 1956

Louis Weiner, Asst. Regional Attorney
U. S. Department of Labor
809 Lafayette Building
Philadelphia 6, Pa.

Re: Mitchell, Secretary vs. Rennekamp
U. S. Dist. Ct., Western Dist. of Pa.
Civil Action #14758

Dear Mr. Weiner:

When we were before Chief District Judge Gourley on September 5, 1956 in the above matter, in connection with our Motion for the Bill of Particulars, the court suggested that the requested information be furnished by you informally to avoid further technical proceedings and delays

Pursuant to that suggestion, you read off a list of names of defendant's employees in connection with whose employment the violations complained of took place and you listed certain dates for each employee presumably indicating the period of time covered by the alleged violations.

Upon checking the dates furnished by you at that time with our employment records, it now appears that your dates cover the entire period of employment for the respective employees mentioned. This creates uncertainty in our minds as to the exact situation and we find it necessary to request further clarification in order to be in a position to prepare our Answer. Our question is this: In providing us with the data on September 5 were the dates given by you intended to indicate that the alleged violations took place during the entire period of employment of each of the individuals involved or is it the position of your office that certain violations took place on various occasions during that period? In the latter event I would request that you go one step further and give us the dates of specific violations with respect to each of the employees so that we may be able to check our records for those specific dates and be in a position to prepare our defense.

Please advise as to your position regarding the above matter.

Very truly yours,

DAVID R. LEVIN.

DRL/mg

Letter from Plaintiff's Attorney to Defendant's Attorney.

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
809 Lafayette Bldg.
Philadelphia 6, Pa.

October 10, 1956

David R. Levin, Esq.
100 Standard Life Building
Fourth Avenue & Smithfield Street
Pittsburgh 22, Pennsylvania

Re: Mitchell v. Rennekamp
Civil No. 14758

Dear Mr. Levin:

Upon receipt of our Wage-Hour files in the above matter from the Field, I can reply to the question raised in your letter of September 24, 1956, as follows:

In providing you with the data in Judge Gourley's Court in Pittsburgh on September 5, 1956, the dates given to you indicated that the violations alleged in the complaint took place during the entire period of employment of each of the individuals involved.

Very truly yours,

LOUIS WEINER,
LOUIS WEINER,
Assistant Regional Attorney.

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MAR 31 1958
JOHN T. FEY, Clerk

No. 882

No. 12278

In the United States Court of Appeals for the Third Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

KENNETH E. RENNEKAMP INDIVIDUALLY AND D/B/A RADIO STATION WEMR, APPELLANTS

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE AND APPENDIX

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COUNTERSTATEMENT OF THE CASE

Because of the omissions of material facts from defendant's statement of the case, this counterstatement is necessary.

The employees who were found to have been underpaid in violation of the Act are those engaged at defendant's radio station in Emporium, Pennsylvania, who are employed as announcers, engineers, or combination announcer-engineers. They edited and rebroadcast news reports at regular intervals throughout the day (Fdg. 36b), operated and maintained the transmission equipment (Fdg. 37b), announced and presented the programs (Fdg. 37b), prepared the commercials (Fdg. 37b), and sold the advertisements from which the entire income of the station was derived (R. 31b; Fdg. 37b).

Defendant is a member of the Associated Press, and has an Associated Press teletype at its radio station (Fdg. 35b, 36b). Over this machine, the station receives news gathered by the Associated Press from all points of the United States and throughout the world (Fdg. 36b). This news comes in over the machine 24 hours a day, every day except Sunday (Fdg. 36b). In addition, cables, messengers and the mails are used as communications, both in receiving and transmitting news to and from the Associated Press and its membership (Fdg. 36b). Defendant broadcasts this news over his radio station throughout the day, for periods ranging from one minute to

15 minutes at a time (R. 2b, 3b, 17b). In addition, defendant receives at the station reports of football and baseball games, originating outside the State, and rebroadcasts these reports (R. 3b).

The testimony of the employees uniformly disclosed that the employees had worked many hours over and above those recorded on their time sheets, principally in selling advertising (R. 2b, 19b) but also in connection with the presentation of station programs and operation and maintenance of the transmission equipment (R. 16b, 17b), and that the employees were not compensated for these hours. Defendant's evidence in rebuttal was his own testimony that he had never authorized any such work, had specifically advised the employees not to work beyond the hours scheduled, and that the credibility of the employees' testimony is doubtful because of certain inconsistencies in it (Deft.'s Br. pp. 17–21; R. 23b).

In addition, defendant testified that even if hours beyond those reported on the time sheets were worked, such work was concealed from him by the employees, so that a violation of the Act could not be imputed to defendant (Deft's Br. pp. 23–28). On this point, the testimony of the employees was that defendant required and expected them to sell advertising (which accounted for a large proportion of the extra hours worked) (R. 1b, 5b, 19b), that defendant had instructed the employees not to place on the time sheets more hours than the fixed weekly schedule which had been established for each employee even though additional hours might be worked by the employees (R. 2b, 11b, 12b, 18b), and that occasionally the hours on

the time sheets did not accurately reflect the portion of the day actually worked because to do so would indicate that more than one employee had been working at the station at the same time and defendant disapproved of such "overlapping" (R. 18b).

While the radio station here involved has been closed since the Department's investigation, defendant continues to maintain an interest in several other broadcasting stations, and with respect to one of these stations, an injunction has previously been issued against violations of the Act (Fdg. 40b). Also, at the time of the trial, though the power had been disconnected and the tower removed, the station building remained serviceable, and the transmission equipment still remained in it (R. 30b).

On these facts, the trial court held that the employees were covered by the Act, that the preponderance of the credible evidence indicated that defendant had violated the Act by permitting employees to work hours not recorded on their time sheets for which they received no payment, and that the closing of the station did not render the action moot (R. 40–42b). Accordingly, it enjoined defendant from violating the Act in the future (R. 6a).

ARGUMENT

I. The court below was plainly correct in holding Defendant's radio broadcasting to be interstate commerce within the scope of the Fair Labor Standards Act

Defendant argues that it is "highly doubtful" whether its broadcasting station is engaged in interstate commerce because of its low power and because its radius was limited to 10 miles in any given direc-

tion. There are two conclusive answers to this contention: (1) regardless of the power or radius of the station's broadcasting, the regular and continuous receipt and transmission of news and information continuously coming by teletype from sources outside the State suffices to bring defendant's employees within the coverage of the Act, and (2) the consistent judicial recognition that radio broadcasting cannot practicably be confined within State lines, and is, by its very nature, interstate commerce.

1. As the court below concluded, the regular receiving, reading, editing and broadcasting of news from out-of-state sources continuously received via Associated Press teletype machine, "which was in operation at defendant's radio station on a 24 hour basis" (deft's appx. 4a), was sufficient to bring defendant's employees within the coverage of this Act, on the authority of the Supreme Court's decisions in *Lorain Journal* v. *United States*, 342 U. S. 143; *Associated Press.* v. *United States*, 326 U. S. 1; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103; see also *Western Union* v. *Foster*, 247 U. S. 105. In the *Lorain Journal* case, the Supreme Court, not only ruled that "[t]here can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce" [342 U. S. at 151], but specifically held that the "local dissemination" within the state of such news "to the reading public *is an inseparable part of the flow of the interstate commerce involved*" [*id.* at 151–152, emphasis added]. In so ruling, the

Court expressly declined to rely on the "suggestion that the out-of-state distribution of some copies of the Journal * * * provided, in any event, a sufficient basis for classifying the publisher's entire operation as one in interstate commerce," stating that it was not necessary to rely on this ground (*id.* at 150).

Such continuous and immediate transmission of out-of-state news and information is, also, plainly within the scope of the statutory definition of "commerce" in the Fair Labor Standards Act, which expressly includes "transportation, transmission, or communication" among the several States.[1] It has long been settled that this definition extends "throughout the farthest reaches of the channels of interstate commerce" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125), and more specifically that it extends beyond the point of a temporary or intermediate pause to include the "entire * * * practical continuity of movement" to the intended destination (*Jacksonville Paper*, at 568–569; *Walling* v. *American Stores Co.*, 133 F. 2d 840, 845–846 (C. A. 3)), as well as activities "so closely related to the interstate movement" or "to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it" (*Overstreet*, 318 U. S. at 130; *Mitchell* v. *Vollmer*, 349 U. S. 427 at 429).

The *Lorain Journal* decision's description of the dissemination of out-of-state news to the local read-

[1] Section 3 (b) defines "commerce" as meaning "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

ing public as "an inseparable part of the flow of the interstate commerce involved" meets so precisely the above quoted tests of this Act's "in commerce" coverage, that there can be no serious doubt of the correctness of the decision below that the *Lorain* decision is controlling here.

Apparently defendant does not deny that the continuous receipt of incoming interstate communications for almost instantaneous transmission to radio listeners is part of the "practical continuity of [interstate] movement" (*Jacksonville Paper, supra*), or that it is any the less "an inseparable part of the flow of the interstate commerce involved" than was the "local dissemination" of news in the *Lorain Journal* case. Instead, defendant attempts to distinguish the *Lorain* decision by emphasizing that the newspapers there were "*sold* * * * for *profit*" (br., p. 8). But clearly this is no ground for concluding that defendant's receipt and broadcasting of out-of-state news is not part of the interstate commerce covered by this Act (even assuming, which the record in this case does not disclose, that defendant's news broadcasts were not sponsored and hence not profitable). For it is settled that the interstate commerce covered by this Act is not limited to "commercial" transactions or to "articles that are intended for sale, exchange, or other trading activities." See *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 512. See also *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879 (C. A. 7), certiorari denied, 347 U. S. 1013 (holding within the coverage of the Act the printing of religious materials

primarily for Sunday Schools and other branches of the Church's organization).

Newspapers have consistently been held to be within the coverage of this Act in reliance upon the reasoning of the *Associated Press* and *Lorain* decisions. See *Walling* v. *Sun. Pub Co.*, 47 F. Supp. 180, at 191, para. [5]. (W. D. Tenn. 1942), affirmed, 140 F. 2d 445, 448 (C. A. 6), certiorari denied, 322 U. S. 728; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320, 326 (D. Mass. 1940), vacated on other grounds, 120 F.-2d 213 (C. A. 1), affirmed *per curiam*, 315 U. S. 784; *McComb* v. *Dessau*, 89 F. Supp. 295 (S. D. Cal. 1950); *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907, 909 (N. D. Tex. 1941), affirmed, 121 F. 2d 207 (C. A. 5), 316 U. S. 624; *Fleming* v. *Gazette Pub. Co.* (not officially reported), 1 WH Cases 613 4 Labor Cases Para. 60,452 (N. D. Ohio, 1941).[2] Thus the district court in the *Sun Publishing* case, *supra*, specifically held that employees engaged in receiving, printing and circulating "news, information and intelligence from nation-wide and world-wide sources are engaged in interstate transmission and communication of news and are, therefore, engaged in interstate commerce within the meaning of the Fair Labor Standards Act" (47 F. Supp. at 191). The Sixth Circuit, in affirming, expressly ruled that the contention that appellant's newspaper was not within the Act's coverage "must be rejected on the authority * * * of *Associated Press* v. *National Labor Relations Board*" [301 U. S. 103], stating that "it is unimportant that only

[2] Reversed on consent of the parties by C. A. 6, April 14, 1942, for a procedural reason not pertinent here; order of appellate court unreported.

a small percentage of appellant's newspaper are sent out of the state" (140 F. 2d at 448). Similarly in the *Lowell Sun* case, *supra*, the district court found the reasoning of the Supreme Court's *Associated Press* decision sufficient to make it clear that this Act covered the newspaper's employees and that "the percentage or number of newspapers * * * that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states" [36 F. Supp. at 326]. And exclusive reliance was placed upon the receipt and transmission of news originating from out-of-state sources in *McComb* v. *Dessau, supra*, where the court held that, although employees of a newspaper, "because of the purely local circulation, * * * may not be engaged in 'the production of goods for commerce,' their activities *in * * * incorporating into such production news and materials gathered and originating outside the state, place them in the category of employees 'engaged in commerce'*" (89 F. Supp. at 297, emphasis added).

Since the transmission of news by radio broadcasting is even more "immediate" than its dissemination by newspapers (see *Lorain Journal* decision, *supra*, 342 U. S. at 152), and is plainly "as continuous and rapid as science can make it" (see *Western Union* v. *Foster, supra*, 247 U. S. at 113) the "local" transmission of out-of-state news by radio broadcasting would seem, *a fortiori*, "an inseparable part of the flow of the interstate commerce involved" (see *Lorain Journal, supra*, at 151–152), and therefore interstate commerce within the scope of this Act. This has evidently been

recognized by the courts, which have uniformly held or assumed without question that the Act is applicable to radio broadcasting stations. *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C. A. 5); *Wilson* v. *Shuman*, 140 F. 2d 644 (C. A. 8); *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180 at 182 (W. D. Tenn. 1942); *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907 (N. D. Tex. 1941); *Fleming* v. *Capital Broadcasting Co.*, (not officially reported) 1 WH Cases 486, 3 Labor Cases Para. 60,340 (M. D. Ala. 1941); *Mitchell* v. *Monahans Broadcasters* (not officially reported), 11 Wage Hour Cases 767, 24 Labor Cases, para. 68,090 (W. D. Tex. 1953); *Cummins* v. *Carteret Broadcasting Company*, 137 F. Supp. 547 (E. D. N. C. 1956). It is significant that there is not a single decision to the contrary on the coverage of either newspapers or radio broadcasting stations. Indeed, even where the coverage of a newspaper's employees has been contested, coverage of employees working for an affiliated broadcasting station has been conceded. See *Walling* v. *Sun Publishing Co., supra*, 47 F. Supp. at 182. Apparently the Act's applicability to radio broadcasting is so clear on the additional ground discussed *infra* under (2), that it has been generally recognized and accepted without serious contest throughout the almost 20 years this Act has been in effect.

2. Defendant's inability to find "a single case wherein the applicability of the Fair Labor Standards Act to small radio stations was raised, contested, or directly in question" (see br., p. 5) is entirely understandable, in view of the long-standing consistent judicial recognition that all radio broadcasting, re-

gardless of the location, power or size of the station, unavoidably crosses state lines and is necessarily an integral and inseparable part of the interstate broadcasting channels. This was emphasized in the earliest judicial decisions relating to radio broadcasting, dating back more than a quarter of a century ago and antedating the enactment of the Fair Labor Standards Act, and has been consistently reaffirmed by the courts throughout the years up to the most recent decisions.

As the Supreme Court pointed out in its earliest decisions upholding the Federal power to regulate radio communication as interstate commerce, "[n]o state lines divide the radio waves" (*Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279), and "[b]y its very nature broadcasting transcends state lines and is national in its scope and importance" (*Fisher's Blend Station* v. *Tax Com'n.*, 297 U. S. 650, 655).[3] This scientific fact is as true today as it was at the time of those Supreme Court decisions, as has been consistently recognized by subsequent, as well as the prior, court decisions. See *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C. A. 3), certiorari denied, 340 U. S. 929; *Station WBT* v. *Poulnot*, 46 F. 2d 671 (E. D. S. Car. 1931); *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318 (C. A. 7); *United States* v. *Gregg*, 5 F. Supp. 848, 858 (S. D. Texas 1934); *Whitehurst* v. *Grimes*, 21 F. 2d 787 (E. D. Ky.

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[3] Thus *all* radio broadcasting stations, regardless of their size or radius of operation, must be licensed by, and are subject to regulation under, the Federal Communications Act (47 U. S. C. A., Secs. 151 et seq., and 301 et seq.).

1927); *City of Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 4, 190 S. E. 594, 596–597 (Sup. Ct. Ga. 1937). See also *City of New York* v. *Federal Radio Commission*, 36 F. 2d 115 (C. A. D. C.).

Thus this Court, in the *Allen B. Dumont* case, *supra*, (decided Sept. 1950), ruling that "there can be no doubt of the correctness" of the construction of the term "radio communication" to include "television as 'one form of radio transmission'" (184 F. 2d at 155), stated unqualifiedly (*id.* at 154):

> There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature.

The consistent line of *radio* broadcasting decisions, with not "a single authority holding to the contrary" (see *American Bond & Mortgage* decision, *supra*, 52 F. 2d at 322), have similarly emphasized the inherent interstate nature of all radio broadcasting. As stated in one of the earliest court decisions involving a small amateur radio station: "Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission." *Whitehurst* v. *Grimes*, 21 F. 2d 787 (E. D. Ky., Sept. 17, 1927). Citing with approval the *Whitehurst* decision, *inter alia*, the three-judge court in *Station WBT* v. *Poulnot*, *supra*, ruled that "There can be no doubt that communications by radio constitute interstate commerce," and that the contention "that all radio communication is necessarily interstate * * * in the present state of the art * * * appears to be correct" (46 F. 2d at 675). Like the Supreme Court decisions (*supra*) which followed a few years later, the Court in the *Poulnot* case

relied on the inherent nature of radio broadcasting, pointing out that "the art of radio broadcasting consists in transmitting electro-magnetic waves set in motion by electricity at a station and passing through space to numerous receiving instruments * * * and it is impracticable to confine them, at least in the present state of the art, within state lines. * * *All radio communication, anywhere in the United States, travels actually or potentially across state lines * * *" (*id.* at 672). In similar vein, the Georgia Supreme Court in the *City of Atlanta* case, *supra*, pointed out:

> In so far as radio communication is concerned, at its present state of development, there can be no physical division of intrastate and interstate communications. The transmission of the communication over the "ether" is an indivisible movement. No state lines divide the radio waves (190 S. E. at 596).

Thus, far from it being "highly doubtful" whether defendant's station was engaged in interstate commerce, the above consistent line of judicial decisions would seem more than adequate to establish that its station was unavoidably and necessarily engaged in interstate commerce.

While the above decisions involved the plenary constitutional power to regulate commerce (which would include all activities "affecting commerce"), whereas the Fair Labor Standards Act concededly is not coextensive with the full constitutional power, the explicit recognition by the courts that radio broadcasting does not merely affect interstate commerce, but is such commerce itself, makes them directly apposite to

the construction of the "in commerce" coverage of this Act. As the Supreme Court took pains to point out in *Overstreet* v. *North Shore Corp.*, 318 U. S. 125 at 128:

> But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase "engaged in commerce." We said in the *Jacksonville Paper Co.* case, *supra,* [317 U. S. 564], "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."

Since it is evident that any radio broadcasting is necessarily through the medium of interstate broadcasting channels and is unquestionably so intimately related to the proper functioning of these interstate channels as to be an inseparable part of them, we submit that this Act's coverage of all radio broadcasting cannot seriously be questioned. As noted above, p. 9, this has evidently been the generally accepted view and explains the absence of cases in which coverage of small radio stations has been seriously contested. As evidenced by the decisions cited *supra,* pp. 8–9, the Act has frequently and uniformly been held or assumed to be applicable to the operation of radio broadcasting stations, regardless of their size.[4] In *Fleming* v. *A. H. Belo Corporation,* 36 F.

[4] Although not indicated in the court's opinion, the public records of the Federal Communications Commission show that the radio station involved in *Fleming* v. *Capital Broadcasting Company* was licensed (license No. Br. 997) for a power of only 100 watts to serve the local needs of the city of Montgomery.

Supp. 907, 909, (N. D. Tex. 1941) one of the earliest decisions in which the question of coverage of radio broadcasting under this Act was raised, the court summarily brushed the question aside with the observation: "Radio is interstate commerce, that has been decided long ago by this court * * * when the radio cases first came up, and it never has been questioned, that I know of." This observation, made in 1941, is just as true to this day, so far as the judicial, as well as the legislative and administrative, authorities are concerned.

It has been the consistent administrative interpretation, since the Act went into effect almost 20 years ago, that "employees in the telephone, telegraph, *radio* and transportation industry" are engaged in interstate commerce within the scope of this Act, "since these industries serve as the actual instrumentalities and channels of interstate commerce." See Interpretative Bulletin No. 1, "General Statement as to the coverage of the Fair Labor Standards Act of 1938," originally issued October 12, 1938. Succeeding editions of this Bulletin in 1940, 1942, 1947 and the 1950 edition currently in effect, 29 CFR, para. 776.10, have reasserted the same interpretation with the addition of the "television" and "shipping" industries as being among the obvious and typical examples of activities "in commerce."

The inability of defendant's counsel to find any case contesting the applicability of the Act to small radio stations, far from lending any support to its contention, attests the general recognition of the soundness of the administrative interpretation. In-

deed, since Congress, in the 1949 Amendments to this Act, did nothing to change the administrative interpretation in this respect, this administrative interpretation was among those approved by the express legislative provision in Section 16 (c) of the amending Act that all administrative orders, interpretations and regulations then outstanding and not inconsistent with the 1949 amending Act "shall remain in effect." See Section 16 (c) of the Fair Labor Standards Amendments of 1949, reproduced in the Appx., *infra*, p. 34.

The Supreme Court has relied upon Section 16 (c) of the Fair Labor Standards Amendments to uphold three prior administrative interpretations of the Act. See *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270; *Steiner* v. *Mitchell*, 350 U. S. 247, 255. The interpretations upheld in the first two of these cases, though outstanding in 1949, represented a change from a prior administrative interpretation, whereas the interpretation in issue here not only represents the earliest "contemporaneous construction of [the] statute by the [official] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*United States* v. *American Trucking Associations*, 310 U. S. 534, at 549; *Skidmore* v. *Swift & Co.*, 323 U. S. 134), but has been consistently adhered to throughout the years. Since it is plainly not inconsistent with the 1949 Amendments, the *Alstate* and *Waialua* rulings apply, *a fortiori*, here.

II. There is no merit in defendant's contention (raised for the first time on this appeal) that application of the Act to its broadcasting station would violate the Fifth Amendment to the Constitution because of the statutory exemption granted certain small newspapers

Apart from the question of the propriety of raising, for the first time on appeal, what is in effect a claim to exemption from the Act, appellant's claim to such exemption patently has neither statutory nor constitutional basis. Admittedly, there is no exemption in the terms of the statute for radio broadcasting stations of any kind, and it is too well-settled to require argument that any exemption from this Act must be strictly construed and limited to employees "unmistakably within its terms and spirit." *Phillips Co., Inc.* v. *Walling*, 324 U. S. 490, 493; *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 517.

Defendant's contention that the statutory exemption for certain small newspapers without a similar exemption for small radio stations constitutes "an unwarranted, arbitrary and unreasonable discrimination" in violation of the Fifth Amendment is conclusively answered by the Supreme Court's decision in *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178. In that case, it was contended that the exemption for small newspapers, which at that time exempted only certain weeklies or semi-weeklies, unreasonably discriminated against small *dailies*. The Supreme Court disposed of this contention summarily as follows [327 U. S. at 184]: "The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to

less than the entire field [citing *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Currin* v. *Wallace*, 306 U. S. 1, 13–14]."[3]

The decision in *Currin* v. *Wallace, supra,* which the Supreme Court considered to be the conclusive answer to the contention made in *Mabee* v. *White Plains, supra,* is equally applicable to the contention here made by Defendant. The Supreme Court there said [306 U. S. at 14]:

> There is no requirement of uniformity in connection with the commerce power (Art. I, Sec. 8, par. 3) such as there is with respect to the power to lay duties, imposts and excises (Art. I, Sec. 8, par. 1). * * * Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment * * * but that Amendment, unlike the Fourteenth, has no equal protection clause. * * * It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continu-

[3] It may be noted that this same contention was made before this Court in the case of *Walling* v. *News Printing Co.*, 148 F. 2d 57 (see decision of the district court, 49 F. Supp. 659, at 661, and briefs on appeal). Apparently this Court did not regard the contention as having sufficient substance to require consideration. The district court held the contention to be without merit for the same reasons stated in the Supreme Court's decision in *Mabee* v. *White Plains Publishing Co.*, *supra*.

ance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power.

III. The overwhelming weight of the evidence establishes that defendant's employees worked substantial amounts of time for which they received no pay

The testimony of the employees Doelicke, Burton and Dolnack was uniformly to the effect that they had worked substantial periods outside the regularly scheduled time shown on their time sheets, and that they were not paid for this additional work.

Defendant argues that, in ruling from the bench at the close of the evidence that the weight of the evidence was against defendant, the trial court failed to evaluate the evidence properly. The short answer to this is that throughout the trial the court was aware, and expressly so advised defendant on repeated occasions, that in view of defendant's contention that the employees had not actually worked the hours they claimed to have worked, the case would necessarily be decided on the preponderance of the evidence (R. 31b, 32b). It is plain that the credibility of the various witnesses was in the forefront of the court's attention throughout the trial and that the court made its evaluation as the trial proceeded—a proper, and indeed the most accurate, method of performing this function of a trial court. In addition, the court accorded defendant an opportunity to present his own evaluation of the evidence at the conclusion of the trial, and treated defendant's

objection thoroughly in a thoughtful and well-considered opinion on defendant's motion for a new trial (R. 3–5a). In the face of these facts, defendant's contention that the trial court failed to "take time to evaluate the evidence" is entirely without substance.

Defendant also attacks the credibility of the testimony of the employees. The evaluation of the evidence from this standpoint is peculiarly a function of the trial court, whose findings will not be upset unless clearly erroneous. *Drexler* v. *Koza,* 156 F. 2d 370 (C. A. 3), certiorari denied, 329 U. S. 771, rehearing denied, 329 U. S. 831; *Smith* v. *McLane,* 174 F. 2d 819 (C. A. 3). Defendant places his major emphasis on an inconsistency in Burton's testimony, viz. that Burton testified he worked unrecorded and unpaid hours at night doing so-called "remote" and "request" shows, and that Burton's own time sheet recorded these hours as worked and that Burton himself admitted that he was paid properly for the hours shown on the time sheet (deft's. br., pp. 18–19). This inconsistency is a minor one and readily understandable when Burton's entire testimony is examined, a procedure not possible from the inadequate and misleading excerpts printed in defendant's appendix. Burton testified uniformly to the effect that he worked several hours a day driving Doelicke, the station manager, around town to sell advertising to the local merchants, and that he would accompany Doelicke in making such calls (R. 14b, 16b). Burton also testified that the time spent in this work was not shown on the time sheet and that he was not paid for it (R. 12a; R. 14b).

He stated that when he was initially hired he understood what his duties would be but did not "have an understanding at the time I was hired what my hours would be." He also testified that his regular workday was changed during March 1955 (R. 15b). In view of these circumstances, Burton's statement that the time spent on the "remote" and "request" shows was "in addition to his regular workday" simply indicated an uncertainty as to what was his regular workday at the particular time.

Indeed, for a part of the period involved, it would seem that defendant concedes that Burton was not paid for some of this evening work, since defendant did not carry his examination of this alleged inconsistency beyond February 19, although Burton testified that these shows ran until March (R. 13b). In any event, Burton's alleged "lie" in this respect is plainly a minor failure of recollection or an attempt to give an honest answer to questions phrased in such a manner as not to take into account the uncertainty of what Burton's "regular hours" were or the change in his schedule during the period involved. Burton's testimony was plain that he regularly assisted Doelicke in selling advertising and that in fact his workday regularly began at 9 o'clock or shortly thereafter, several hours before his time sheets indicated he was at work. It is also plain that he was not paid for some portion of his actual workday, regardless of what his "scheduled" hours may have been.

The other alleged inconsistencies likewise disappear when the entire testimony of the witnesses is examined, as distinguished from the inadequate and mis-

leading fragments printed in defendant's appendix. For example, defendant states that Doelicke testified he sold advertising in the afternoons five days a week and Burton testified that he did it in the mornings (br., p. 17). Yet Burton stated flatly that he drove and accompanied Doelicke on these missions in both "mornings and afternoons" (R. 14b) and Doelicke himself indicated that he sold advertising at both times. (R. 1b, 2b, 7b, 8b, 24b)* Defendant also objects generally that the failure of the employees to claim compensation for the extra time worked impairs the credibility of their testimony. It is plain that Doelicke made a repeated request for payment and that on one occasion defendant advised Doelicke that defendant's wife had thrown Doelicke's letter into the wastebasket. Likewise, it is plain that Burton complained to Doelicke, the station manager, that he should be paid for the work he was performing (R. 14b); and since Doelicke was managing the station for defendant, Burton's action is the normal and perhaps the only proper one for him to have taken.

Defendant makes no attempt to impeach the testimony of Lesco and Dolnack, who also stated that they had worked substantial time for which they were not paid. Defendant simply urges that this evidence should not be considered because plaintiff failed to list these witnesses among those whom, prior to the trial, he advised defendant were the witnesses who

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*Doelicke was never asked directly whether he sold advertising in the morning. These excerpts show he sold when he wasn't broadcasting, and that he broadcast regularly in the afternoons during one period.

would be called. These witnesses were employed at the same radio station as Burton and Doelicke, and in view of the allegations of the complaint that the violations related to "employees in and about" the radio station, their testimony can have come as no surprise to defendant. Nothing in Rule 26, FRCP, requires that the adverse party be given an exhaustive list of witnesses, or that a party "limit itself in the introduction of testimony to certain named witnesses," *Coca-Cola Co.* v. *Dixie-Cola Laboratories*, 30 F. Supp. 275 (D. Md.), affirmed on other grounds, 117 F. 2d 352 (C. A. 4), certiorari denied, 314 U. S. 629; *Aktiebolaget Vargos* v. *Clark*, 8 F. R. D. 635 (D. C. D. C.). If material witnesses are expected to be unavailable because not readily amenable to the process of the court in which the trial was held, and then unexpectedly return to the district, as was the case with Dolnack, there is nothing to inhibit the trial court's consideration of his testimony.

Evidently recognizing that he could not effectively refute the evidence that the employees worked many hours for which he did not pay them, defendant falls back on the contention that he was unaware these hours were being worked, did not authorize them, and was entitled to rely on the time sheets prepared by the employees themselves. The trial court simply did not believe defendant was unaware this work was being performed, and it is difficult to see how it could have concluded otherwise. Defendant himself testified that prior to the time the station went on the air, he visited the locality frequently and devoted substantial time to promoting and selling advertising for the

station (R. 28b, 29b). When the station was about to go on the air, he sent Mrs. McLaughlin and Mrs. Lesco into the area for several days for an extensive selling program. Defendant also testified that the entire income of the station was derived from advertising and that it was necessary to sell advertising to keep the station operating (R. 31b). Doelicke, the manager, testified that defendant asked him to get the other employees also to sell advertising, and promised them the same 15% commission he had promised Doelicke (R. 1b, 5b). Defendant also testified that he visisted the station occasionally after it went on the air but that his visits gradually dropped off and after a few months he rarely visited the station, and all of these visits were for very brief periods, on some occasions only a few minutes.

The mere recital of these facts is enough to show that defendant was aware advertising had to be sold, that the station employees were the only ones to do it, and that they were necessarily devoting a substantial amount of time to such work. Since the regular posted work schedules of the employees related only to the time to be spent at the station in order to conduct its operation, it is likewise evident that defendant knew that no compensation was being paid for this unscheduled work. In such a situation, defendant's contention that he had a right, under the statute, to rely on the time sheets furnished by the employees has a peculiarly hollow ring. Such "reliance" by defendant was aptly characterized by the trial court as either gross carelessness or as "very cutely [keeping] it outside of his record" (R. 34b). It is

well-settled that such conduct by any employer does not relieve him from his obligation to meet the statutory requirements, or mitigate his failure to do so. *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C. A. 8); *Mitchell* v. *Raines*, 238 F. 2d 186 (C. A. 5); *Walling* v. *Panther Creek Mines*, 148 F. 2d 604 (C. A. 7).

IV. The action is not moot and the grant of injunctive relief was plainly a valid exercise of the trial court's discretion

Defendant argues that because it has closed the particular station where the conduct which gave rise to this litigation occurred, this action is moot and the grant of an injunction was improper. Defendant cites no authorities for its claim of mootness, and the very fact that defendant is vigorously pressing this appeal on the substantive issues involved would seem sufficient to refute its claim of mootness. It is too well-settled to admit of contest, at this late date, that the cessation of the operations or of the conduct which gave rise to an enforcement action under a Federal regulatory statute does not render the case moot. *Carpenters Union* v. *Labor Board*, 341 U. S. 707; *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427; *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C. A. 4); *Tobin* v. *Ramey*, 205 F. 2d 606 (C. A. 5), rehearing denied, 206 F. 2d 505, certiorari denied, 346 U. S. 925; *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945. See also *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498; *Federal Trade Commission* v. *Good-*

year Co., 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261.

Specifically, in actions to enforce the Fair Labor Standards Act, the Supreme Court has repeatedly rejected claims of mootness based upon cessation of the operations involved in the particular litigation or discontinuance of violations (see *Vollmer, Reuter, Joyce Agency* and *Helmerich & Payne* decisions, *supra*). Thus, neither completion of the construction project involved in the *Vollmer* case, nor the dissolution of the corporate employers in the *Reuter* and *Joyce Agency* cases rendered those actions moot.[1]

As the Supreme Court has pointed out in other leading decisions on the mootness issue, "the most important object" of litigation "by the Government as a substantial trustee for the public under the act of Congress" is not merely to terminate past and current conduct but "that the defendant should be enjoined for the future" (*Trans-Missouri* decision, *supra*, 166 U. S. at 308, 309) and that there be a final settlement

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[1] Although the opinions in the *Vollmer* and *Joyce Agency* cases do not explicitly reflect the ruling on mootness, in both cases the issue was raised and fully briefed by both parties—in *Vollmer*, at the invitation of the Court, and in *Joyce* upon respondent's motion to dismiss for mootness. Since the Supreme Court then, in both cases, proceeded to a decision on the merits, *reversing* the judgment of the courts below which had denied relief, its decisions were, in effect, rulings that the cases were not moot. In *Joyce*, the judgment of the district court granting an injunction was reinstated, and in *Vollmer*, after remand to the District Court, an injunction was issued (Civil Action No. 3280, E. D. La., New Orleans Div., dated August 12, 1955).

of any dispute over the legality of challenged practices which are "capable of repetition" (*Southern Pac. Terminal* decision, *supra,* 219 U. S. at 515; see also *United States* v. *W. T. Grant Co.,* 345 U. S. 629 at 632–633).

In effect, defendant is asking that he be permitted to frustrate the enforcement of the Act merely because he has voluntarily discontinued violations, which he would then remain free to resume at will either at the same location or elsewhere. See *Walling* v. *Helmerich & Payne, supra,* specifically holding that "[v]oluntary discontinuance of an alleged illegal activity" prior to trial does not render moot an enforcement action under this Act (323 U. S. at 43). As the Court pointed out in the *Carpenters Union* case, *supra,* (in holding that the enforcement action by the Labor Board had "not been rendered moot by the completion of the * * * project") the challenged practices may be "merely a sample of what might be repeated elsewhere if not prohibited" (341 U. S. at 715). See also the *Pennsylvania Greyhound* decision holding that an action to enforce a Board order "does not become moot because it [the order] is obeyed or because changing circumstances indicate that the need for it may be less than when made" (303 U. S. at 271). To hold that an enforcement action can become moot merely by voluntary changes in the conduct of defendant's business, as the Court pointed out in the *W. T. Grant* case, *supra,* would "mean that the defendant was entitled to a dismissal as a matter of right * * *. The courts have rightfully refused to

grant defendants such a powerful weapon against public law enforcement" (345 U. S. at 632).

In the *Haile Gold Mines* case, *supra*, which, like the instant case, was an action under the Fair Labor Standards Act, and closely paralleled the facts of the instant case in that the employer had ceased operations and dismantled its equipment, the Fourth Circuit, on the authority of the above cited Supreme Court decisions, held that it was settled that such cessation of operations did not render the case moot.

> It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot [citing the *Trans-Missouri, Pennsylvania Greyhound,* and *Goodyear* decisions, *supra*]. * * * This particularly is true where the challenged practices are capable of repetition. See *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498.

If, as seems clear from the above decisions, the case is not moot, defendant's argument boils down to a contention that the court, in the exercise of its sound *discretion,* was not warranted in granting injunctive relief. This contention, also, is manifestly untenable. It is significant that the only authorities cited by defendant is urging *reversal* of the grant of an injunction are cases in which the trial court exercised its discretion to *deny* injunctive relief and was *affirmed* by a court of appeals (see Defendant's brief, pp. 31–32). As this Court has stated, and as even defendant ap-

parently concedes (see deft's. br., p. 31), "It is settled, however, that the question whether an injunction shall be issued under such circumstances is to be determined by the district court in the exercise of its discretion [citing *Hecht Co.* v. *Bowles*, 321 U. S. 321]", and, therefore, unless the trial court has plainly "abused its discretion," its grant of such relief will be affirmed. *United States* v. *Walter Gerbron, Inc.*, 194 F. 2d 708, 709 (C. A. 3).

There was plainly no such abuse of discretion by the court below in the instant case. On the contrary, the grant of an injunction, in the circumstances of this case, was undeniably a sound and valid exercise of discretion under the standards prescribed by the Supreme Court in *Hecht Co.* v. *Bowles, supra.* The Court there took pains to make clear that, although the statutory injunction remedy like the traditional equity injunction is "designed to deter, not to punish," this does "not mean to imply that courts should administer [the statutory injunction provision] grudgingly" (321 U. S. at 329, 330). The courts' "discretion * * * must be exercised in the light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases" (*id.* at 331).

The particular circumstances of this case more than amply support the conclusion of the court below that there is need for an injunction. Defendant admittedly is still in the radio broadcasting business and retains an interest in other broadcasting enterprises, and still retains a serviceable building con-

taining usable transmission equipment at the site of the station here involved. He is also vigorously pursuing this litigation and still vehemently contesting the applicability of the Act. In these circumstances, the case is almost exactly parallel to *Haile Gold Mines, supra,* which, like defendant, had also closed down its operations, "dismantled its mines and removed its machinery," and surrendered its federal license from the United States Mint. (136 F. 2d at 105.) The only conceivable difference between *Haile* and the present case is that *Haile* ceased operations at the request of the War Production Board, whereas defendant here did so voluntarily, and *Haile,* in surrendering his license indicated he would doubtless wish to apply for a new license to resume gold mining at some indefinite future date after the war when the Government ban on gold mining was lifted. In this respect, defendant's circumstances point to an even greater opportunity for violation because defendant is under no such order to cease operations indefinitely and, indeed, has substantial interests in *presently-operating* broadcasting facilities of the same type as the station involved in this suit. In *Haile,* the Fourth Circuit reversed the trial court's *denial* of relief, and ruled that the injunction should have been granted because "the possibility of future violation of the Act by Haile is very much with us and not merely within the realm of prophecy" (136 F. 2d at 105).

This Court, in *Woods v. Wolfe,* 182 F. 2d 516, reached the same conclusion in analogous circumstances. There it was argued an injunction against

rent control violation should not issue because defendants had ceased "acting as landlords" prior to the trial, the occupancy of the premises having been taken over by their son. This Court, affirming the district court's grant of an injunction, said:

> On the merits we agree with the conclusion of the court below that because the defendants are presently in a position, perhaps temporarily, where they could not violate the law, it does not mean that they might not be quick to violate it again. A four-year long period of prior deliberate misconduct requires a strong showing that the offending individuals are actually in *locus penitentiae*. The Wolfes have made no such showing. Under the circumstances we cannot say that the court below abused its discretion in issuing the injunction (182 F. 2d at 518).

Similarly, in *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004 (C. A. 3), this Court held that even a present *willingness* to comply with the Board's order does not warrant the denial of court enforcement, for "the question is not what the respondent's attitude may now appear to be, but what it was down through the hearing before the Board * * *. Any other course would make a proceeding before the Board interminable for which an adjudicated offender's later repentence can furnish no excuse" (120 F. 2d at 1007). In *Chambers Construction Co.* v. *Mitchell*, 233 F. 2d 717, 725 (C. A. 8), the employers' attitude that they "need not change and that the Act does not and never did apply" and their "insist[ence] that they are not here

as sinners doing penance but as among the just who do not need penance" was held to warrant issuance of the injunction.

Defendant here, far from showing that he is "actually in *locus penitentiae,*" is still vigorously asserting his right to continue his operations as before. Indeed, his cessation of the violation was not due to willingness to comply, or to either voluntary or involuntary *compliance* with the Act, but occurred solely because the radio station became unprofitable. Defendant's assertion that the violation ceased following investigation made by the Department of Labor is demonstrably inaccurate, for the employee Agnello testified flatly that he had not been paid for work he performed in February 1956 (R–19b)—contrary to defendant's misleading statement that "his testimony is unclear" with respect to this continued violation (brief, p. 17).

The considered conclusion of the trial court, upon which it determined that discretion required the issuance of the injunction, was that defendant had either failed to devote the proper attention to the operation of the station or "very sagaciously, we will say, saw there was not any record there that would incriminate him in any way" (R–34b). This Court, in *Bowles* v. *Leithold,* 155 F. 2d 124, certiorari denied *sub nom. Leithold* v. *Porter,* 327 U. S. 794, has had occasion to consider such conduct, and has held the issuance of an injunction to be proper under the Emergency Price Control Act, where the defendant failed to furnish the required information concerning his prices in the base period. The fact that the information was

furnished after the suit was begun, but prior to the hearing, was held to be no basis for reversing the issuance of the injunction, for the reason that

> A defendant who has thus made it practically impossible for anyone to tell whether he is violating price ceilings or not, by withholding the fundamental information, is not unlikely to violate those ceilings under cover of the darkness which his failure to give information has created. At least it is not unreasonable for one to conclude that such a happening is within the range of probability and to guard against it by injunction (155 F. 2d at 127).

In *Leithold*, no violations of the substantive requirements of the Price Control Act were proved or even alleged, while in contrast, defendant has been shown to have committed numerous substantive violations over a longer period, so that the injunction is even more appropriate in this case. When it is remembered that at the time these violations occurred, an injunction was outstanding against a corporation of which defendant was an officer for violation of the same statute here involved, the need for the injunction becomes even more obvious.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX I

Statutory Provisions Involved

The pertinent statutory provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201 *et seq.*) are:

> Sec. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> Sec. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

APPENDIX II

[15] Q. What were the terms of compensation on a weekly or semi-monthly basis that were agreed upon between Mr. Rennekamp and yourself?

A. Well, the agreement was $65 per week for 48 hours.

Q. For 48 hours?

A. Yes.

Q. Was that broken down into an hourly rate?

A. Yes, it was.

Q. What was the hourly rate?

A. A dollar and a quarter an hour for 40 hours, and it was a dollar eighty-seven for time and a half for the 8 hours—I think it came to that figure—in other words, a total of $65.

Q. Sixty-five dollars per week?

A. That's right.

* * * * *

[19] Mr. WEINER. I shall ask the witness to answer.

A. Well, there were several occasions where Mr. Rennekamp and I had a talk and he suggested I put some pressure—several times—on selling, and I would get 15 percent commission. I mean, that item, that item was brought out to me several times, and it was also said to me the other employees should sell, too—they'll receive their 15 percent, but they never did sell any.

Q. Did you actually put in any time selling?

A. Oh, I had to. It's the only way I could—

Q. How many hours a day would you put in?

A. Well, I never kept track of how many hours.

Q. To your best recollection?

A. I would spend a whole afternoon downtown.

Q. How many hours would that come to?

A. I would say three, four hours.

Q. How many days a week would you put into your selling effort?

A. The business days, five days.

Q. Five days a week?

A. Yes.

Q. Would the time that you spent in your selling activities be included in the time reports that you sent in to Mr. Rennekamp?

A. No, sir.

[20] Q. Why not?

A. Well, for the, for the simple reason Mr. Rennekamp mentioned to me 48 hours on that—would be the working time on that sheet.

* * * * *

[21] Q. Did you announce at the station as part of your duties? I think you so testified.

A. (Witness nods.)

Q. Did you announce news reports?

A. Yes. We had our regular news casts.

Q. Where did those news casts originate?

Mr. LEVIN. If you know.

Q. If you know. Let me ask you a more direct question: Did you have an A. P. wireservice at the station?

A. Yes—Associated Press.

Q. Did the A. P. wire service come over the ticker?

A. Yes, we had the ticker there.

Q. Where was the ticker located?

A. Right in the confines of the station shack itself.

Q. How frequently did you broadcast the A. P. wire service reports?

[22] A. Well, I know, we had three 15-minute newscasts and——

Q. Three fifteen——

A. Fifteen-minute newscasts.

Q. Was that daily?

A. Pretty near, with the exception of Sunday because Sunday was a little different time schedule, but Monday through Saturday it was.

Q. Three 15-minute newscasts?

A. Yes.

Q. Using the A. P. wire service?

A. That's right.

Q. Did any of the other employees announce newscasts?

A. Oh, yes.

Q. Who were some of the other employees, if you recall?

A. Well, there was a lad by the name of Dolnack and another boy by the name of Burton. There were several others but I don't recall their names.

Q. Did the station ever broadcast any out-of-town baseball or football games?

A. Well, the first season we broadcast the—through a pickup—the Pittsburgh Pirate baseball games and also the Pittsburgh Steelers football games.

Q. Would these games be played within Pennsylvania or outside of the State?

A. The football games came from outside the State and [23] there were several foot—baseball games. I imagine when the season got on toward the end and the games became very important with the top contenders they were broadcast from other parts, too. There weren't many of those but they evidently pleased the fans that way.

Q. Did you broadcast weather reports?

A. Yes.

Q. Where did those weather reports originate?

A. We took ours from the Associated Press machine.

Q. Were those weather reports a daily occurrence?

A. Yes.

Q. And you would announce them daily?

A. Yes.

* * * * * * *

[25] Q. Did you ever receive any commission on your selling activities?

A. No, sir.

Q. Did you make reports to Mr. Rennekamp concerning your selling activities?

The WITNESS. What do you mean by "reports," sir?

Q. Well, did you communicate to Mr. Rennekamp stating whom you contacted, what sales you were able to make and what [26] sales you were not able to make?

A. Well, in the beginning I did because he had asked to send us—to send him a weekly—rather, a monthly estimate on accounts and accounts that had paid, and that I did in the first few months.

Q. And then what happened?

A. The reason I was happy to do this, not only because he asked——

Mr. LEVIN. That's objected to as not responsive to the question.

Q. Well, you did this for the first few months?

A. Yes, sir.

Q. And then you ceased doing it?

A. Yes.

Q. My question is: Why did you cease doing it, Mr. Doelicke, was there any reason specifically?

A. Because I was hearing no response from him and it did not seem to rectify the bad situation we had of getting more money in the bank. The reason for sending

this was to—in other words, to show Mr. Rennekamp how much deposit was in the bank that we could draw our checks on.

• • • • •

[52] Q. We're talking now about a few days later. You say there was another discussion with Mr. Rennekamp a few days later?

A. Then and several times he mentioned about the selling.

Q. Will you give us the substance of those conversations as well as you recall them either that second time or any subsequent times?

A. Well, it was words to the effect that I should sell and I would get 15 percent commission for selling—any time I would sell I would get the 15 percent.

Q. Was there anything said about how that 15 percent would be arrived at? Was that 15 percent on the billing?

A. No. That was 15 percent on each sale.

Q. The amount of the sale?

A. Yes. The billing is the same thing—the billing, the billing is something else again.

Q. Were you asked by Mr. Rennekamp to put in any extra hours making sales?

A. No. He just said go out and sell.

Q. He didn't specify when you were to go out and sell?

A. No.

Q. How many times did you talk to Mr. Rennekamp during that particular week that you say he came up? You've mentioned [53] two times. Were there any further questions with Mr. Rennekamp around that time?

A. Well, in his other visits mention was made about, "Let's put a little pressure on the selling and ask the

other boys if they want to sell, too. They'll get 15 percent."

Q. On those other occasions was anything said as to what hours you were to put in selling?

A. There was no mention made of hours.

Q. At any time?

A. No.

Q. Between the time in April of '54 that you went to WEMR and the time you left how many times would you say that Mr. Rennekamp had been up to the station in person?

A. Actual count I couldn't give you.

Q. Well, could you give us a rough idea?

A. No, I couldn't.

Q. As a matter of fact, he came there very infrequently, isn't that true after you first got there?

A. Well, as I stated previous, the first six months he came up, in the first part of the six months, he came up frequently, then it gradually dwindled off into nothing.

Q. So, after the first six months he would come up there at long intervals, isn't that right, or hardly at all?

A. Yes.

* * * * *

[65] Q. And does that show an operation of 12 noon to 7 p. m.?

A. That's right.

Q. And does that indicate that that's the period of time the station was on the air on those two days?

A. No. This is my time record, the time I worked.

Q. Would there have been anyone else there other than you in addition to those seven hours?

A. Yes, it's possible.

Q. Do you know?

A. Well, I don't know. I haven't got these records on my fingertips. This is something that happened over a year and a half ago.

Q. Didn't you usually work Sundays at the station while it was in operation?

A. Not all the time, no.

Mr. WEINER. May I see that time record, please?

(Document handed to Mr. Weiner.)

Q. Now, you say that you don't have these matters at your fingertips, is that right?

A. No, sir.

Q. But you still want to say that you worked 60 hours a week throughout the entire period in view of the fact that you do not have these records at your fingertips?

[66] A. Had I known I was supposed to keep them I would have kept them and I would have had them here.

Q. Would your records not have been a duplicate of what I just showed you?

A. They most certainly would have not.

* * * * * *

[71] Q. Did you work 60 hours every week that you were there?

A. Yes, yes.

Q. Right on the nose?

A. That's right.

Q. Did you time yourself?

The WITNESS. You mean right on the nose, 60 hours?

Q. Yes.

A. No. I would say that was, was the least that I worked, 60 hours.

Q. What was the most you worked?

A. Oh, gosh, it depends how long I spent with clients, and how long I had to do billing and everything like that. There were some nights that I did billing I stayed up long after we went off the air.

Q. Well, when you testified that you worked 60 hours on direct examination how did you arrive at that figure?

A. Well, I was on the air from six at night to 11:15.

Q. Now, just a minute, when you say you were on the air——

Mr. WEINER. Let him answer the questions. He's trying to give you some specific hours. I think you ought to let him answer the question without cutting in.

[72] Mr. LEVIN. Go ahead.

Mr. WEINER. Go ahead.

A. (Continued.) Well, that six, you've got to figure 5:45, because six o'clock was the news, to 11:15 sign-off. There was an hour for lunch, from 12 to 1; there was an hour in the morning when I would give one of the boys a break, and we also did a breakfast show.

Mr. WEINER. When did that start?

The WITNESS. I think it was nine o'clock or nine to ten, or second cup of coffee thing, something like that.

Mr. WEINER. Nine a. m. you started. Go ahead.

The WITNESS. It was more or less to give him a break, too.

Mr. WEINER. From nine till when?

The WITNESS. Till ten.

A. (Continued.) Now, the afternoon, of course, as soon as I finished that hour I would sit down and start going through the station business and letters and any correspondence and stuff like that and I'd usually be up there right through until one o'clock.

Now, these times that I did the billing and everything, that was never considered in the working time either. There was no mention made of that, who would do it, so I took it upon myself to do it. In

the afternoon I would spend at least three or four hours downtown with clients.

* * * * *

[93] Q. Do you recall getting paid some extra money?

A. It's vaguely in my mind, yes. It wasn't much, but I remember one instance way in the beginning when I did get something.

Q. Could your testimony about the 60 hours that you worked, plus, be vaguely in your mind, too, during this period?

A. No.

Q. That's not vague?

A. No, because I lost 36 pounds. That's—there's no vagueness about those hours.

* * * * *

[103] Q. Now, since you were working at this station from, you say, April of 1954, do we understand that you presented these time sheets showing the hours that you worked in the operation of the station and received payment from time to time and continued to work without making an issue of money that you now claim was due you for selling advertising? Is that a fact?

A. I made an issue of it many a times, many a times I called up Pittsburgh, but I got the standard answer that Mr. Rennekamp was on the road or some place like that.

[104] Q. But you only wrote him one letter about it and that was five weeks before the termination of your service, isn't that right?

A. One letter that I kept, yes—I mean, in other words, a copy that I made of it.

* * * * *

Q. Mr. Doelicke, tell us under what circumstances you left the employ or discontinued your employment with Station WEMR?

A. Well, the, the night before the station was put off the air I called up Mr. Rennekamp, and this is the whole story here on this particular instance, and I got Mr. Rennekamp on the phone this time for the simple reason that he answered first, and I told him who I was and that we needed another engineer because Burton was leaving, and that was all right, he was going to see what we can do.

[105] Then I asked if he had received my letter. He says, "What letter is that?" I says, "Well, the one I sent to you about five weeks ago," and he says, "Oh, that. My wife read it and threw it in the wastebasket," so then he hung up. I was holding the receiver. So the next thing I knew, the next day—oh, I called back again, I believe, and got his wife and said that—"Better get somebody to replace me."

The next day Dolnack answered the phone at the station and it was Mr. Rennekamp and Mr. Dolnack had received—George Dolnack had received word from Mr. Rennekamp to put the station off the air, so George said, "Well, I'm only the announcer here. Tell that to Bob," so I answered the phone and Mr. Rennekamp said, "I want that station put off the air right now. That's an order," so that was it.

* * * * *

[115] Q. Do these hours shown here include those hours spent trying to sell?

A. No, they don't.

Q. I show you Defendant's Exhibit B, consisting of 19 pages of Time Records. Do these records reflect all the hours of work actually spent in the pay periods designated in this first pay period from September 15, 1954, through September 28, 1954?

Mr. LEVIN. Just a moment. That is objected to for the same reasons given in connection with Exhibit A, and all questions pertaining to Exhibit B will be objected to for the same reasons, and for the further reason that at this late date they constitute self-serving declarations on the part of the witness.

Mr. WEINER. Now, Mr. Doelicke, answer the question.

A. No, they don't show the full time that I put in there. They show the 48 hours which, which were required of [116] us to be put on the time sheet.

Q. When this schedule of hours was drawn up, Mr. Doelicke, was it drawn up for any particular purpose?

Mr. LEVIN. That's objected to as leading and improper, irrelevant, incompetent and immaterial.

The WITNESS. May I have that question once more?

Q. Was there any particular purpose for drawing it up this way?

A. Yes. The purpose was to even out the 48 hours per week which I was supposed to have on my time sheet.

Q. Now, did you have any conversation with Mr. Rennekamp with respect to how these should be shown, what hours they should show?

A. As to specifications as to air time, no, but as to specification of 48 hours and no more, that Mr. Rennekamp made pretty clear with all of us.

* * * * *

[119] Q. Now, did you send in one of these sheets in the early part of your employment with hours showing in excess of 48 in a work week?

A. Yes. This was before I actually knew about the 48-hour limit.

Q. And what happened?

A. Well, it was sent back to us and to make out a new time sheet and that I did, conforming with 48 hours.

Q. Then what happened?

A. Well, I got my check.

[120] Q. And did you conform with the 48-hour schedule thereafter?

A. For the rest of the period that I worked there, yes, sir.

Q. In each of the periods of work shown in Defendant's Exhibit B did you work selling or attempting to sell time on Radio Station WEMR?

* * * * *

A. This time sheet was made an announcer-manager and all selling time was not put on this sheet at all, on any sheet.

Q. The time shown on all of the sheets included in Defendant's Exhibit B was only for the time spent by you as an announcer-manager, is that correct?

* * * * — *

[121] A. Yes, sir.

* * * * *

[13] ALBERT P. BURTON, a witness in behalf of the Government, having been duly sworn, testified as follows:

Direct examination by Mr. WEINER.

* * * * *

[21] Q. And when did those request shows start in relation to your commencement of employment with the defendant company?

A. I don't recall the exact date but I would say——

Q. As best you can recall.

A. I would say perhaps six weeks.

Q. Six weeks?

A. After I began working at WEMR.

[22] Q. That would bring it sometime——
A. In December.
Q. In December of 1954?
A. Yes.
Q. How long did these request shows run?
A. Over a period of months?
Q. Yes, or whatever the period of time was?
A. Three months, four months perhaps.

* * * * *

[25] Cross examination by Mr. LEVIN:

* * * * *

[26] Q. * * * And at any given time, was it necessary to have more than one person on duty?
[27] A. Yes.
Q. To keep the station on the air?
A. Yes.
Q. Who would that be or why or where?
A. Well, the reason would be—one reason would be the request show which ran from nine o'clock until eleven o'clock in the evenings, because one person was required to answer the telephone and the other person was required to play the records and announce between the records.
Q. Well, as I understand you, you said that those request shows ran for a period of a couple of months or something of that sort?
A. About three months.
Q. About three months?
A. Possibly four.
Q. As a matter of fact, they started in December of 1954, isn't that right?
A. As I recall, yes.
Q. Aside from these request shows you talked about, I mean during the normal routine operation of the station, wasn't it a one-man operation?

A. Well, I believe the request show was routine. It is in most stations.

* * * * *

[39] Q. When would you do your driving, in the afternoons?

A. Mornings and afternoons.

* * * * *

[40] Q. Let me ask you this: Did you ever for any occasion you drove and it was not within your scheduled hours, did you ever demand payment?

A. No. Oh, I did, yes.

Q. From whom?

A. Mr. Doelnicks.

* * * * *

[43] Redirect examination by Mr. WEINER:

* * * * *

[44] Q. My question is, what time did you arrive at the station?

A. At the station shortly after nine o'clock, usually.

Q. The record here shows you arrived at twelve noon?

A. That's right.

Q. My question to you is, what is the actual time that you reported at the station? Was it nine o'clock or was it twelve noon as shown on this time record?

A. Nine o'clock.

Q. Nine o'clock?

A. That's right.

Q. I show you the record for the workweek ending 1–17–55 and ask you whether this record which shows twelve noon as reporting time or whether nine a. m. was the actual reporting time?

A. Nine a. m., or shortly after nine a. m.

Q. I show you the record for February 1st, 1955, and ask you the same question, which is the correct time, twelve noon or nine a. m. for reporting?

A. Nine a. m.

Q. That is true consistently through March 1st, 1955, March 29th, 1955. March 29th, 1955, shows you reporting at seven-thirty a. m.?

[45] A. Yes. The hours were changed about this time and I began to work a shift on the board, that is as announcer, just about that time. So the hours reported there should be correct as far as my time actually at the station on the air.

Q. Reporting at the station?

A. Yes.

Q. At 7:30 a. m.?

A. Yes.

The COURT. That's commencing when?

Mr. WEINER. 7:30 a. m.

The COURT. What date?

Mr. WEINER. March 29, 1955.

Q. Prior to March 29, 1955, what was the time you actually reported at the station for work?

A. Nine o'clock.

Q. That's all.

Recross examination by Mr. LEVIN:

Q. Mr. Burton, are you saying that although you show on here that you reported at certain times that you came in at nine o'clock, earlier than you show on here?

A. Yes.

* * * * *

[46] Q. Was that voluntary on your part or were you required to do it?

A. I was required to do it.

Q. By whom, Mr. Doelicke?

A. By Doelicke.

Q. All you would do then was simply wait until he discusses his business and come back, is that it?

A. That's right.

Q. Then you'd chauffeur him to the next customer in Emporium?

A. That's right.

Q. How long would that take, that whole performance?

A. Well, no definite time, as long as he was making calls.

Q. What were those dates that you have testified to here? Were you referring to this period in February that you show twelve noon and 11:45 reporting?

A. Yes, you see we did this, we worked on this basis up until [47] the time shown I believe it was in March when I alternated one week I would open the station and work through into the afternoon and then the next week I would come in in the afternoon and work through until 11:15.

Q. On these particular days, I am looking at December 17th to December 30th, when you show twelve noon and 11:45 as your time——

A. Yes.

Q. Do you mean you came in at nine o'clock at that point?

A. Yes, sir.

Q. Then you went out again with Doelicke?

A. Yes.

* * * * *

[49] GEORGE E. DOLNACK, JR., a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. WEINER:

* * * * *

[50] Q. Did you announce newscasts?

A. Yes, I did.

[51] Q. Did you take news off the ticker?

A. Yes, I took it off the ticker, edited it and broadcast it.

Q. Edited the news?

A. That's right.

Q. How many times did you broadcast?

A. At the most three and four times a day.

Q. For what period of time?

A. I imagine after I had been there between four and six weeks, then I started to broadcast between three and four times a day.

Q. Between three and four times a day?

A. That's correct.

Q. How long would these newscasts last?

A. These newscasts lasted five minutes and in some cases, a 15 minute newscast.

* * * * *

[54] Q. Do you recall whether or not the hours you worked on remotes and so on, this request show was indicated on your schedule of hours worked?

A. No, they weren't indicated on my schedule of hours worked. I mentioned that to Mr. Doelicke that I'd like to receive compensation for the extra time I put in. His reply was there would be no use because Mr. Rennekamp would not pay me overtime for those hours but that was during the period up until May 31st but the second period between—oh June, sometime in June to July 31st, I did work overtime with James Starrett who was chief engineer, and turned more than 48 hours in for that and I was compensated for that.

By Mr. LEVIN:

Q. You say you were compensated?

The COURT. Don't break in just because he said that. Let him tell his story. You heard that.

Mr. LEVIN. I am not sure.

The COURT. I think you heard that.

A. Subsequently to that time, I didn't turn in my time other than the 48 hours because Mr. Doelicke stated there would be no use and I wouldn't receive compensation for it.

* * * * *

[60] A. It shows on the time record I worked those hours but actually I didn't work those hours. I was told by Mr. Doelicke to put this record of time on the time sheet in order to show Mr. Rennekamp that none of the employees' time at the radio station would overlap and maybe Mr. Rennekamp would question the reason why two or more men would be on duty at the radio station during that time.

Q. So Mr. Doelicke then instructed you to make out the record this way, so Mr. Rennekamp wouldn't know there was overlapping going on, is that correct?

A. That's correct.

Q. You never told Mr. Rennekamp there was overlapping time, did you?

A. Well, there had to be overlapping time in order that the [61] station perform as it did.

* * * * *

[75] JAMES D. AGNELLO, a witness in behalf of the Government, having been duly sworn, testified as follows:

* * * * *

By the COURT:

[91] Do the time sheets you have just been shown by Mr. Levin correctly reflect the hours you worked between August 1955 and February 1956?

Mr. LEVIN. Do you want to look at these?

The COURT. I am asking a question. Read the question to him.

(Question read.)

A. No.

Q. What is your explanation why the time sheets do not reflect the hours?

A. I sold time.

Q. Well, over and above the time shown on the sheet, is that it?

A. That's right.

* * * * *

[66] CHARLES A. WELSH, Jr., a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. WEINER:

Q. What is your name?

A. Charles A. Welsh, Jr.

Q. Where do you live?

A. 5207 Lawson Road, Baldwin Borough, Pittsburgh 36.

Q. By whom are you employed?

A. The Associated Press.

Q. How long have you been employed there?

A. Since July 1st, 1942.

Q. What is your present position?

A. Correspondent in charge of the Pittsburgh Bureau of the Associated Press.

Q. How long have you held that position?

A. Since August of 1955.

Q. Could you tell us what kind of an organization the Associated Press is?

A. The Associated Press is a non-profit cooperative news gathering organization gathering news throughout the world for distribution to newspapers and radio stations, principally [67] in the United States and other countries.

Q. Are there associate memberships in the Associated Press?

A. Yes, we have a category which we list as associate membership. I am unable to give you the technical differentiation between associate and regular member.

Q. How does the Associated Press gather its news?

A. The Associated Press gathers its news primarily through the efforts of the newspapers and radio stations which are members of the A. P. and the efforts of Associated Press news staffers wherever they may be employed.

Q. How does it distribute or transmit its news to its members?

A. Principally and almost completely by teletype messages over leased wires. Stories that are written by newsmen for distribution to newspapers and/or to radio stations.

[140] KENNETH E. RENNEKAMP, a witness in behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. LEVIN:

* * * * *

[141] Q. Is your law practice the major portion of your activity or do you have other activities?

A. Well, my law practice is the major, takes the major portion of my time, of course. I do have other activities. At the present [142] time do you want to know?

Q. Well, at the present time and during the period from April 1954 to the period covered by this action.

A. Well, in April of 1954, I was president of WKRZ, Incorporated, a radio station operating in Oil City, Pa., and also counsel for the station. I have a 50 percent interest in Radio Station WKBI in St. Mary's, Pa., in partnership with Cary Simpson.

Q. With respect to that station, do you have any part in its operation at all?

A. No, I am what is known in law as a silent partner. I mean, I don't have any time to devote to the operation and by agreement between Mr. Simpson and myself, he took over from the very beginning the full responsibility of the management and operation.

* * * * *

[143] Q. During the period from April 1954 through 1955, the time covered by this proceeding, how much time were you able to devote, did you devote to WEMR on an average?

A. You are speaking personally of my——

Q. Your own activity.

A. Of my own activity. I would say probably on an average of three to five hours a week would be the greatest time.

Q. Where would that time be spent?

A. In the Pittsburgh office.

Q. During the period from April 1954 through 1955, how many times would you say you had been at the station in Emporium?

A. I would say seven or eight times.

Mr. WEINER. What period was that?

Mr. LEVIN. From April 1954 through 1955. That's the time covered in this action.

Q. How long a time would you be there in any single instance?

A. Well, I was in Emporium, to the best of my knowledge, on April 28th, 1954, from 11:10 a. m. to 11:17 a. m. I stopped there on my way to Leominster, Massachusetts.

Q. On other occasions when you'd be there, did you spend——

A. Then I was on May 5th, to the best of my knowledge, 1954, for about five minutes on my return trip from Leominster, Massachusetts. Then I was there again on May 15, 1954, [144] to investigate a complaint that the F. C. C., the Federal Communications Inspector, had inspected the station and found it operating without a license, licensed operator.

Q. Who was the manager at that time?

A. Well, the man in charge of the station at the particular time of the inspection was Mr. Doelicke.

Q. How much time did you spend on that occasion?

A. I spent about an hour with Mr. Doelicke and Mr. Weber. Mr. Weber was called in during the course in the inspection by Mr. Halloway of the Federal Communications Commission, the district engineer.

Q. Let's just leave the details of that for the time being. After that, were you in Emporium?

A. Yes, the next time I was in Emporium was in June. I took a Mr. Joe Gearing from Pittsburgh whom I hired as an announcer to Emporium.

Q. How much time were you there at that time?

A. Well, I spent about—I would judge I was there 45 minutes.

Q. On subsequent occasions without specifying the particular date, how much time would you spend on each visit?

A. Then I went back to Emporium the next day after I took Mr. Gearing up and the reason that I did, the reason I went back, Mr. Gearing didn't have a license and I went to Oil City to see if a license had been sent there for him and I went back the next day for a period of probably an hour.

[145] Q. Subsequent to that time what other visits?

A. In July of 1954, I went to Emporium with a station wagon to pick up some copper wire that had

been used in the construction of the station and I was there for about fifteen minutes, just long enough to load the copper wire and leave. Then I went down in August of 1954. I was in Emporium with Mr. Weber, Mrs. McLaughlin, for a period of oh, possibly two hours.

Then I was in Emporium in October of 1954, I think about the 24th day of October, to see Mr. Fowler, who had been engaged as an engineer, to meet the man and talk with him.

Q. After October, were you in Emporium for a couple of months?

A. No, I was not in Emporium in 1954 until May the—I believe it was the 28th of May, 1955.

Q. Then subsequent to May in 1955, how many times would you say you were there?

A. Well, I was there on an average of possibly once every two weeks after that.

Q. For how long a time?

A. For a period of about six months.

* * * * *

[162] Q. Can you clarify your instructions to Mr. Agnello?

A. Yes, I can. I advised each employee that they could work forty hours per week at regular time and that any time over forty hours would be on a time and a half basis and that they should get permission to work the overtime, in the event of an emergency they should work the overtime and place it on their time sheet, the reason for it, and on the back of the time sheet I set forth instructions to that effect.

Q. Did you make a point of limiting them to the required number of hours?

A. No, I did not. That's impossible in the radio business.

* * * * *

[163] Q. Whose duty was it to make sure that the time schedules were observed by the employees of WEMR?

A. Well, normally the station manager would be responsible for it, I mean he was the police officer. I was not present. We relied on the honesty of the employees.

* * * * *

[166] Q. Did you have any discussion with him at that time concerning his own hours?

A. Yes, I asked him what he was doing in the time that he was showing on his time sheets and he indicated to me how he spent his time.

Q. Did he indicate to you what his own schedule of working hours was at that time?

A. Yes, he did.

Q. What did he tell you?

A. Well, he said his normal day was to have breakfast in the coffee shop in Emporium at approximately 10:50 a. m. and that at approximately eleven o'clock a. m., he would stop at any place of business that needed advertising or had called in the station and he would stop to pick the copy up or talk advertising and then after he finished his conversation or his calls he would go to the station in Emporium and do a twelve o'clock newscast, it was on from twelve to twelve-fifteen.

Then he was finished at—well he worked over part-time while the man was at lunch. I think he worked until one o'clock—that's right—while the man was at lunch as a relief man. Then he went out back home and he would stop if he had to go back home to pick up copy if there was any calls came in that morning.

[167] Q. Did he tell you what his schedule was later in the day?

A. Yes, after his schedule was tentatively 5:15 or 5:45 it alternated in the evenings till some time 11:15 or 12:00 o'clock and he said in the evenings he would help the boys down at the station, he would do the six-o'clock news, he would select records shows for the man for programming and he would do, write copy and that he would do billing at the end of the month for an hour, an hour and a half.

Q. Do you know whether during those evening hours he was the only employee on duty at the station or not?

A. No, I know from the time sheets there were two employees on duty.

Q. It would only be necessary for one to actually operate and announce, is that right?

A. That's correct.

* * * * *

[178] Q. Your testimony that you gave on direct examination indicates that you were at the station in Emporium a total of seven times during the period April, 1954 when the station first went on the air until October, 1954, is that correct?

A. That's correct, I said seven or eight times, I believe.

Q. And that you were not in Emporium from October, 1954 to May 28, 1955?

A. No, sir, I was not.

Q. How did you know that the time sheets that were being submitted to you were or were not accurate?

A. I assumed they were correct.

[179] Q. On what basis did you make your assumption?

A. On the honesty of the employees.

Q. Was that the only assumption?

A. That plus checking on the telephone and conversation with Mr. Doelnicke and correspondence from Mr. Doelicke.

Q. Did you check with anyone else with respect to the hours worked?

A. Yes, I checked with some people in the St. Mary's station.

Q. In the St. Mary's station?

A. That's right.

Q. What station?

A. WKBI.

Q. Where is that located, St. Mary's?

A. St. Mary's.

Q. With whom did you check there?

A. I checked with Mr. Simpson, the manager.

Q. With respect to what?

A. With respect to the people that were on the air at Emporium, the approximate times he heard them on the air. He would go through Emporium to see the Coudersport station several times a week and he had one of his employees lived in Emporium that worked at the St. Mary's station.

Q. Would that checking give you information with respect to the amount of time that was spent in selling advertising or in writing script or in programming or in billing activities?

[180] A. I would say it would, yes.

Q. How?

A. From my instructions to these employees, I assumed that they were following instructions when they were turning their time sheets in direct.

Q. You are not answering my question. How would checking with St. Mary's give you information with respect to the amount of time spent in selling and in these other activities engaged in by these employees at Emporium?

A. Just generally.

* * * * *

[184] A. I assume he was, yes.

Q. Did you know about that?

A. Yes, I can tell from the bank deposits that came in, the bank deposit sheets, who he was selling to.

Q. Exactly. Therefore you had knowledge of the people with whom he was doing business in relation to selling advertising for station WEMR?

A. That is a difficult question to answer.

Q. Well, don't you know the names of the people?

A. Yes, but there was also other people selling besides Mr. Doelnicke down there. Mrs. Lasseo testified she had been down there to sell. I believe Mrs. McLaughlin had been down there to sell. I had sold advertising down there. I can't tie any direct account to Mr. Doelnicke's selling.

By the COURT:

Q. How many days did you spend selling advertising in Emporium?

A. I was in Emporium from approximately, let's see, it was about August of 1953 until March of 1954. I supervised the erection of the tower, the building of the building.

By Mr. WEINER:

Q. Wait a minute. The question was, how much time did you spend selling advertising?

A. All right, all this time I was talking advertising to the merchants of Emporium.

Q. Did you sell a contract?

[185] A. Yes, they promised us advertising down there and we received it.

Q. Did you consummate any contracts for advertising?

A. I never personally signed any contracts. I turned it over to whoever was selling down there, Mrs. McLaughlin principally.

Q. How much time did you spend on an average in a week selling in Emporium?

A. Well now——

Q. Your best estimate of the time?

A. I would say, I have to break it into two parts. I spent very little time selling subsequent to the time the station went on the air until June of 1955. Then the station was off the air in 1955 due to not having a licensed engineer at the station and I went down in June to rehabilitate the operation and at that time I spent, oh, I would say on ten occasions I contacted the merchants down there, Brown's Boot Shop, the manager, and Emporium Hardware and I talked to Mr. Taylor at the Emporium Trust Company. We had a long discusion about advertising and I talked to Olson's, which is a card shop in town and I was in the—talked advertising to the—

Q. How much time did you spend in this activity?

A. I would say ten times in about three hours, would be thirty hours, I'd say.

Q. Thirty hours a week?

A. Thirty hours for the whole time.

[186] Q. For the whole time?

A. That's right.

Q. For the entire time you were in Emporium?

A. No, that was in June of 1955 until the station went on the air.

Q. How much time did you spend in Emporium selling advertising before the station went on the air?

A. It was from August 1953 till March of 1954, every weekend.

Q. Every weekend?

A. Every weekend.

Q. When did you sell advertising on the weekends?

A. On Saturdays when I would go to these places to purchase merchandise.

Q. Is Saturday a busy day in Emporium?

A. Fairly so, yes, sir.

Q. Would you have time to speak to businessmen for selling of advertising?

A. When I was buying nails, when I was buying lumber, when I was having meals, I was talking radio and advertising.

Q. You say in September of 1954 Mr. Doelnicke was given the job of managing the station in Emporium, is that correct?

A. That's correct, yes.

Q. In November Mr. Burton was hired and in November of 1954 Mr. Doelnicke was hired. Who hired these employees?

A. Why Mr. Doelnicke hired them, hired the employees.

* * * * *

[198] Cross examination by Mr. WEINER:

Q. Mr. Rennekamp, you say you surrendered your license to operate WEMR to the Federal Communications Commission?

A. Yes, sir, that's correct.

Q. That was done in October of 1956?

A. Well, I am not sure of the exact date, Mr. Weiner. It was done through our Washington law firm. We have a law firm, Welch, Mott and Morgan in Washington, D. C. that represents stations and they surrendered the license by letter.

Q. Sometime in October of 1956?

A. When we went off the air in 1956, yes.

Q. Does that mean you cannot reapply for that license again or for any license again for a radio station?

A. Oh, no, that wouldn't prevent me from applying for a radio station.

By the COURT:

Q. Do you still own the property or did you own the property where the transmitter is?

A. No, I didn't own the property. My wife owned the property down there. I didn't own the property.

Q. Does she still own it?

A. Yes, she's selling it right now to a neighbor down there. It was still there. They had an explosion. I haven't been out there.

Q. Is there any equipment on it, the buildings still on it?

A. Yes, the building is still there. It was the last time I was down.

Q. Is there any other equipment on it beside the building?

A. No, the old transmitter is still in the building.

* * * * *

[200] By the COURT:

Q. Did you say you had an interest in WKBI in St. Mary's?

A. I have 50 percent.

Q. Also in Oil City?

A. I am a stockholder in Oil City corporation, yes, sir.

* * * * *

[201] By Mr. WEINER:

Q. Do you have any interest in any other radio station?

A. At the present time?

Q. Yes.

A. I have some stock in the Latrobe Broadcasters, Incorporated.

Q. What?

A. The Latrobe Broadcasters, Incorporated. It's a corporation that owns the station in Latrobe, Pa.

* * * * *

[206] By the COURT:

Q. Well now, let's see, does the income from the station, the gross income, come from advertising?

A. Yes, it does, sir.

Q. You had to have advertising in order to operate?

A. That's right.

Q. Somebody had to be out constantly selling?

A. That's correct.

Q. Getting advertising copy, getting it into the station?

A. That's correct.

Q. Who wrote the advertising copy?

A. Sometimes the merchants had a form of copy, sometimes the merchant himself had a national advertiser like Brown's Boot Shop would have a copy service.

Q. Somebody had to look after the advertising to see it was in shape so the announcer could put it on the air?

A. Whatever little advertising.

Q. That's what you depended on?

A. That's right.

Q. You didn't do any selling, only thirty hours?

A. I actually was out selling. Before that, I was out in 1953 and 1954 when we were building the station, soliciting advertising.

[207] The COURT. You see, the point is from what his testimony has been in the case, what his defense has been here, I don't see how you are going to get this witness to say because he produced, we will say, certain copy, and the station wasn't successful, that there wasn't somebody out selling advertising.

* * * * *

[209] The COURT. On the subject, on the precise issue and that is whether they put in extra time. That is overtime, over and beyond the time that they reported, that is the heart of this case. This man can't deny, he can't seem to deny, he doesn't know it, he wasn't there. I'd like to have you put on if you have got any testimony, that they didn't do this work. Otherwise, the preponderance of [201] this case is just as plain as you and I, the three of us sitting here.

[250] The COURT. Well, now, gentlemen, I want to say this: That this case can be decided now just as well as any other time so far as the facts of the case are concerned. It is a civil case. It's like any other civil case. It depends upon the preponderance of the evidence and comparison and weight of the testimony. That's all there is to it.

I again point out to Mr. Rennekamp that he is a lawyer, he knows it is not a criminal action. There's just no defense here, no defense to the Government's proof in the case, as I view it. He might have issued instructions and all that sort of thing, but the weight of the testimony, these men he had up there and his manager particularly just simply put in more time and it seems to me he should have known it and he is bound by it, whether he did or did not know about it.

I think under all of the evidence, the Government is entitled to relief and the injunction. It is a civil action. So you present your findings of fact and conclusions of law and we will enter the order.

Mr. WEINER. I will, Your Honor.

Mr. LEVIN. Will Your Honor hear a short argument at this point?

The COURT. I stated the Court's view of the evidence. Do you want to talk about the evidence?

Mr. LEVIN. Yes.

[251] The COURT. Go ahead.

Mr. LEVIN. I'd like to indicate since Your Honor has indicated the weight of the evidence is to be considered, I would like to point out some discrepancies which I think are significant.

Mr. LEVIN. I would point out to Your Honor in the cross examination of Mr. Dolnack, that was the chap that testified after Burton, when he was asked about a certain time sheet and I think that's the crux of this whole situation, he said that Doelnicke told him not to show that because he didn't want Rennekamp to find out that they had been working extra hours. I don't know if Your Honor noted that statement.

[252] Mr. WEINER. No, there wasn't anything about overtime. There was an overlap.

Mr. LEVIN. Whatever it was, they didn't want Rennekamp to find out about it.

The COURT. I took that to be, they understood Rennekamp said to them, here you have got so many hours a week to work. That's all you report. If you work over that, don't let me know about it, but get advertising in and keep the station on the air.

Mr. LEVIN. I submit to Your Honor that it is not a fair assumption.

The COURT. That's what the proof indicates to me, hearing all the proof.

Mr. LEVIN. I think the proof indicates probably these men did work longer, but there is nothing at any point to indicate Mr. Rennekamp insisted they work longer, they did it on their own in order to make the station a going proposition, and didn't want Mr. Rennekamp to know. It seems to me that's evidence of collusion.

The COURT. I think the whole record indicates they worked longer hours than what they reported and I think the records are inaccurate. I think Mr. Rennekamp is bound to know what those men do up there. It is a civil case.

[254] Mr. LEVIN. We have the further point, of course, which I think is not in dispute but the evidence shows in October of 1956, this station is closed, dismantled, license surrendered and that's the end of it, so there is no problem with respect to WEMR which requires the relief sought.

The COURT. Of course, Judge Dobie's opinion there answered that proposition. This man is, of course, still in the radio business, broadcasting business. I don't know, it's one of those things the Government is entitled to this it being a civil action, he is going to comply with the law. It isn't a hardship to him. I don't know why the injunction——

Mr. LEVIN. It is a hardship, an injunction against [255] him would be a hardship, as far as any other activities covered, WKRZ is covered for itself, its employees and so forth, so there is no need——

The COURT. I think the way he operated this station, to my mind the evidence in this case shows very clearly he didn't just bother with this business or else he very cutely kept it outside of his record. One thing or the other. It's either one thing or the other. He was either careless, didn't pay any attention to it or else he very sagaciously, we will say, saw there wasn't any record there that would incriminate him in any way. Its either one thing or the other. I mean it's one of these things. We can talk about it for a week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was heard by the Court without a jury on January 16, 17, and 18, 1957. After carefully considering the entire record and arguments of counsel, the Court made the following:

FINDINGS OF FACT

1. On April 25, 1956, plaintiff, James P. Mitchell, Secretary of Labor, United States Department of

Labor, brought this action in his official capacity to restrain defendant Kenneth E. Rennekamp, doing business as Radio Station WEMR, from violating the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, U. S. C. A. Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act.

2. The complaint alleged that defendant between April 18, 1954, and the time of filing this action on April 25, 1956, paid his employees engaged in commerce or in the production of goods for commerce less than the minimum rates provided for in Section 6 of the Act and in violation of Sections 6 and 15 (a, (2) of the Act; that defendant in the said period worked certain of his employees engaged in commerce or in the production of goods for commerce in excess of the maximum hours provided in Section 7 of the Act, and failed and refused to compensate said employees for their overtime at the rates provided for in the Act and in violation of Sections 7 and 15 (a) (2) of the Act; that defendant had failed to make and keep records as prescribed by regulations issued by the Administrator of the Wage and Hour Division, United States Department of Labor, and by so doing violated the provisions of Sections 11 (c) and 15 (a) (5) of the Act.

3. During the period alleged in the complaint, defendant operated a radio broadcasting station, WEMR, at Emporium, Cameron County, Pennsylvania, having a power of 100 watts under license issued by the Federal Communications Commission. In his answer defendant denied that the radio station was broadcasting in interstate commerce and denied that he was violating any provisions of the Act.

4. Defendant is a member of the Associated Press, a non-profit membership corporation organized under

the laws of the State of New York for the purpose of gathering news nation-wide and throughout the world and distributing that news to its members for publication in their newspapers and for broadcasting over their radio stations. This national and world-wide news is gathered by correspondents and employees of the Associated Press and is transmitted to the appropriate bureau headquarters located in New York, Philadelphia, Pittsburgh, and elsewhere, to be forwarded to its members. In order to communicate with its members the Associated Press uses a wire system consisting of thousands of miles leased from Western Union and the American Telephone and Telegraph Company. Cable, messengers, and mail are also used as a means of communication, both in receiving and transmitting news to Associated Press members. The Associated Press lines of communication are utilized throughout the 24-hour period every day. Under an agreement dated December 13, 1953, the Associated Press agreed to furnish defendant at Radio Station WEMR the special Associated Press radio news service wire report for broadcasting. The Associated Press maintains a teletype machine in defendant's radio station in Emporium, Pennsylvania, to deliver its news report to Station WEMR. These reports are received 24 hours a day, every day in the week except Sunday.

5. Defendant employed numerous employees in and about the said place of business in Emporium, Pennsylvania, in the operation of Radio Station WEMR. These employees were employed as announcers, engineers, combination announcer-engineer, and they performed such duties as editing Associated Press news reports received on the teletype machine at the radio station, broadcasting news reports at regular intervals every day in the week except Sunday, operation and

maintenance of transmission equipment, preparation of commercials, and sale of advertising for defendant's radio station.

6. The minimum wage provisions of the Act were repeatedly violated in regard to the following employees: Robert Curt Doelicke, announcer-station manager, who also spent a substantial portion of his time selling advertising; Albert P. Burton, announcer-engineer; George E. Dolnack, announcer-engineer; James Agnello, announcer, who also spent a substantial part of his time selling advertising; and Mrs. Betty Lesco, sales representative. All of these employees, during the period in question, worked varying hours ranging from three to ten hours per week in excess of time shown on defendant's time sheets and payroll records for which time they were paid nothing.

7. The overtime provisions of the Act were repeatedly violated with respect to all the aforementioned employees who were paid a weekly salary (paid twice a month) regardless of the actual number of hours worked in any given workweek. They frequently and repeatedly worked longer hours each workweek than those specified by Section 7 of the Act and never received excess additional compensation for such excess hours over and above their weekly salaries. These employees who were "scheduled" by the defendant to work a 45¼- or a 48-hour workweek were likewise paid a fixed weekly salary (paid twice a month) which was broken down on the defendant's payroll records to show an hourly rate for the first forty hours and an additional half-time for the hours in excess of forty. However, all of the aforementioned employees actually worked in excess of the "scheduled" hours shown on their time sheets and on defendant's payroll records, but were not compen-

sated for these overtime hours in excess of the "scheduled" hours shown on defendant's time sheets.

Thus, Robert Curt Doelicke, employed from April 1954 to May 1955, worked at least 60 hours per week including hours worked "on their air", selling advertising, writing script, programming, writing commercials, billings, etc. However, said employee showed only 8 hours a day for six days a week or a total of 48 hours on the time sheets signed and submitted by him to defendant's Pittsburgh office, and he received the same pay each pay period irrespective of the hours actually worked each week. He was always paid $65.00 a week or $130.00 on a bi-weekly basis. This was broken down to show payment for the first 40 hours at $1.25 per hour or $50.00 straight time earnings and $1.87½ an hour for the 8 overtime hours or $15.00 for the overtime compensation.

Employee Albert P. Burton was employed from November 1954 to May 1955. His actual hours of work were approximately 54 per week for a substantial period of his employment. Time sheets and payroll records for this employee, however, showed that he worked only 45¼ hours per week. This employee always received $60.00 per week or $120.00 biweekly irrespective of the number of hours actually worked in any workweek.

Employee George E. Dolnack was employed by defendant between November 1954 and July 1955. Most of the time of his employment he was paid $1.00 per hour for a workweek scheduled by defendant for 48 hours and shown on the time sheets and payroll records as 8 hours per day, six days per week, Monday through Saturday. On this basis he was always paid a salary of $52.00 per week representing $40.00 for the first 40 hours and $12.00 for the overtime hours. Said employee for a substantial period of

his employment actually worked in excess of 48 hours per week for which he was paid no additional compensation.

Employee James Agnello was employed from August 1955 to October 1956. In addition to his duties "on the air" he also was instructed by defendant to sell advertising for the radio station. His time sheets and payroll records consistently showed 40 hours per week at an hourly rate of $1.25 or a total of $50.00 per week. Said employee during the period September 1955 to February 1956 regularly worked in excess of 40 hours per week but was paid no additional compensation for such overtime hours during this period of his employment.

8. The defendant kept inaccurate records of daily and weekly hours of work in that he instructed his employees directly or through the station manager to show a specified or "scheduled" number of hours each week, which specified or "scheduled" number of hours was frequently less than the number of hours they actually worked and less than the time required to perform their assigned duties both "on the air" or otherwise, including such duties as selling advertising, remote control broadcasts, and special request shows.

9. On October 20, 1956, defendant dismantled Radio Station WEMR and subsequently was notified by the Federal Communications Commission that the license to operate Radio Station WEMR was cancelled and that the call letters WEMR were deleted.

10. Title to the building and property which housed the radio station continues to be held in the name of defendant's wife and defendant continues to own or have an interest in other radio stations including a 50% interest in Radio Station WKBI, St. Marys, Pennsylvania, in which defendant is a partner, and in Radio Station WKRZ, Oil City, Pennsylvania, of which corporation defendant is the President.

11. On September 16, 1954, a consent decree was entered in the case of *Mitchell* v. *WKRZ*, in the United States District Court for the Western District of Pennsylvania, at Civil No. 9682, enjoining defendant corporation and its officers, agent, etc., from violating Sections 6, 7, and 15 (a) (3) of the Act. Entry of this decree was consented to by Kenneth E. Rennekamp, President, and David R. Levin, Attorney for the Corporation.

CONCLUSIONS OF LAW

1. The jurisdiction of this cause of action and of the parties herein is conferred upon the Court by Section 17 of the Fair Labor Standards Act of 1938, as amended (Title 29, U. S. C. A., Sec. 201, *et seq.*), hereinafter referred to as the Act.

2. Defendant's employees engaged in the receipt, handling, editing, and broadcasting in Pennsylvania of news and information from nationwide and worldwide sources are engaged in interstate transmission and communication of news and are, therefore, engaged in interstate commerce within the meaning of the Act. *Lorain Journal* v. *U. S.*, 342 U. S. 143; *Walling* v. *Sun Publishing Company*, 47 F. Supp. 180, affirmed 140 F. (2d) 445, cert. denied 322 U. S. 728.

3. Defendant's employees whose duties included announcing, keeping radio logs, scheduling programs, writing script, preparing commercials; employees employed as engineers to operate radio transmitting equipment, to take meter readings and to maintain the technical equipment of the radio station, and salesmen to sell advertising and to prepare commercials for broadcasting over defendant's radio station are engaged in interstate commerce within the meaning of the Act. *Walling* v. *Sun Publishing Company*, supra; *Fleming* v. *Capital Broadcasting Co., Inc.*,

U. S. D. C. Ala., 3 LO (CCH) 60, 340; *Cummins* v. *Carteret Broadcasting Co., Inc.*, U. S. D. C. E. D. N. C., 137 F. Supp. 547 (January 27, 1950).

4. The facts in this case shown by a preponderance of the evidence that defendant violated the minimum wage provisions contained in Sections 6 and 15 (a) (2) of the Act.

5. Defendant violated Sections 7 and 15 (a) (2) of the Act by failing and refusing to credit any pay his employees for all overtime hours actually worked.

6. An employer subject to any provision of the Act is required to make, keep, and preserve records of the actual number of hours worked by his employees and of the other information prescribed in Regulations Part 516 of the Administrator of the Wage and Hour Division issued pursuant to Section 11 (c) of the Act. He cannot escape this duty by delegating it to others. The personal non-delegable duty rests on him to inquire into the conditions prevailing in his business and he is not relieved of this duty because the extent of his business may preclude his personal supervison and compel reliance on subordinates. The employer does not discharge his duty by the mere promulgation of a rule. The scheduled hours shown on time sheets signed and submitted by employees to defendant's office in Pittsburgh cannot be considered adequate and accurate records where the employer knew or should have known that they did not reflect the actual hours worked. *Walling* v. *Sun Publishing Company*, supra.

7. Defendant failed to maintain the records of daily and weekly hours actually worked by employees as required by Regulations Part 516 issued by the Administrator of the Wage and Hour Division. The maintenance of innacurate records by defendant as to the actual number of hours worked by many of his employees

resulted in violation of Sections 11 (c) and 15 (a) (5) of the Act.

8. Discontinuation of an illegal practice by a defendant either by going out of business or otherwise after the institution of legal proceedings against the defendant by a public agency does not render the controversy moot. This is particularly true where the challenged practices are capable of repetition. *Walling* v. *Haile Gold Mines, Inc.*, 136 F. (2) 102 (C. A. 4). The discontinuance by the defendant of the operation of Radio Station WEMR does not constitute a basis for dismissal of this action on the facts of this case. The mere suspension of operations by defendant of Radio Station WEMR carries with it no assurance that operations may not be resumed by him in the future at Emporium, Pennsylvania, or at some other place.

9. The plaintiff is entitled to a judgment granting relief in accordance with these findings of fact and conclusions of law.

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IN THE

Supreme Court of the United States

NO. 882

OCTOBER TERM, 1957

JAMES P. MITCHELL, Secretary of Labor,
U. S. Department of Labor

v.

KENNETH E. RENNEKAMP, Individually and Doing Business as Radio Station WEMR, Petitioner

PETITION OF KENNETH E. RENNEKAMP FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, NO. 12,278

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PETITION OF KENNETH E. RENNEKAMP FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, NO. 12,278

To the Honorable, the Judges of the Said Court:

The Petition of Kenneth E. Rennekamp respectfully represents:

1. That he was the defendant in a proceeding which originated in the United States District Court for the Western District of Pennsylvania.

2. The opinion of the United States District Court for the Western District of Pennsylvania is set forth in the record certified from the Court of Appeals for the Third Circuit and transmitted herewith. The opinion

of the Court of Appeals for the Third Circuit has been certified by the Clerk of that court and is a part of this proceeding Appendix, 15-16. Petitioner is not aware that either of the opinions mentioned have been reported in any official or unofficial reports.

3. Petitioner seeks a review of the judgment of the Court of Appeals for the Third Circuit entered on the second day of January, 1958. No order has been entered respecting a re-hearing or granting an extension of time within which to petition for certiorari. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred upon this Honorable Court by the Act of Congress of June 25, 1948 c.646, 62 Stat. 928; 28 U.S.C.A., section 1254, which provides that cases in the courts of appeal may be reviewed by this Honorable Court by Writ of Certiorari granted upon petition of any party to any civil or criminal case before or after rendition of judgment or decree.

4. This Honorable Court is being requested to review and determine whether the defendant, as the owner of a small radio station with power of 100 watts and a signal limited to a radius of 10 miles, situated at Emporium, Pennsylvania, 51 miles from the nearest state line, was subject to the provisions of the Fair Labor Standards Act of 1938, June 25, c.676, 52 Stat. 1060, and Fair Labor Standards Amendments of 1949, Oct. 26, c.736, 63 Stat. 910; 29 U.S.C.A. section 201, et seq. A subsidiary question involves the jurisdiction of the U. S. District Court to enter a decree against defendant enjoining him from future violations of the said Act. Disputed issues of fact involved in the proceeding in the U. S. District Court and argued before the U. S. Court of Appeals for the Third Circuit will not be presented for review.

5. The case involves the rights of the petitioner under the Fifth Amendment to the Constitution of the United States and the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. A. section 201, et seq. The applicable provisions of the Constitution of the United States and of the said Act are set forth in the Appendix hereto.

6. Petitioner was the owner of Radio Station WEMR situated at Emporium, Pa., a community 51 miles from the nearest state line. The radio station operated under 100 watts power with a signal strength of 10 miles in radius. On November 28, 1956 its license was surrendered to the Federal Communications Commission for cancellation, and the station dismantled. While in operation, the said radio station would normally be kept on the air by a single employee at any given time, to-wit, an engineer-announcer, except for occasional broadcasts originating outside of the station when an additional employee would be required at the outside point. The complaint filed in the U. S. District Court alleged applicability of the Fair Labor Standards Act of 1938, as amended; that the District Court had jurisdiction; that defendant violated the minimum wage, maximum hours, and record-keeping provisions of the Act, and prayed for the issuance of an injunction restraining the defendant from future violations. The defendant filed an Answer denying the applicability of the Act, the jurisdiction of the court, and the violations alleged. After a hearing before Honorable Joseph P. Willson, District Judge, without a jury, the issues of law and fact were decided against the defendant and a motion for new trial was, after argument, refused. An appeal was taken to the U. S. Court of Appeals for the Third Circuit at #12,278, argued be-

fore McLaughlin, Kalodner and Staley, Circuit Judges, and a judgment and per curiam opinion were thereafter filed affirming the judgment of the District Court.

7. Petitioner respectfully prays for the allowance of a Writ of Certiorari and a review of the judgment of the Court of Appeals for the Third Circuit for the reasons hereinafter set forth. Your petitioner, as the operator of the smallest type of radio station, engaged in a purely local operation, is one of many operators of small stations situated throughout the United States who are in the same position as petitioner and whose business and property rights will be affected by the determination of this Honorable Court in this proceeding.

Both the District Court and the Court of Appeals treated the present action in a routine manner and failed to give due consideration to the substantial issues of involved. These issues of law have never been squarely raised in, or directly passed upon by, any Federal court prior to the present proceeding.

Section 6 of the Act (29 U.S.C.A. Sec. 206) requires every employer covered by the Act to pay certain minimum wages to each of his employees "who is engaged in commerce or the production of goods for commerce." (Appendix, 17). Section 7 (29 U.S.C.A. Sec. 207) provides for certain maximum hours of employment at the minimum rate and for a higher rate for hours worked over 40 by any employee "engaged in commerce or in the production of goods . . . for commerce" (Appendix 18).

Section 3(b) of the Act (29 U.S.C.A. Sec. 203(b)) defines "commerce" as follows: "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any

State and any place outside thereof." On the undisputed facts, petitioner's employees were not engaged in "commerce" as so defined.

Section 3(i) of the Act defines "goods" as follows: "'goods' means goods . . ., wares, products, merchandice, or articles or subjects of commerce of any character, or any part or ingredient thereof, but *it does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof* . . ." (Emphasis supplied).

Petitioner respectfully submits, and did submit at the argument before the Court of Appeals, that the Fair Labor Standards Act of 1938 as amended did not apply to him since his employees were not, on the admitted facts, engaged in interstate commerce or in the production of goods for commerce as defined in Section 3, subsections (b) and (i) of the Act; that the admitted limit to the signal of his radio station was a radius of 10 miles; in view of the judicial cognizance taken by the District Court Judge that the nearest state line was 51 miles away, petitioner's radio station did not transmit across state lines and was a purely local operation, and that in receiving news from Associated Press, petitioner was in the position of "the ultimate consumer thereof" whose employees were exempt from coverage of the Act.

The opinion of the Court of Appeals (Appendix 15-16) indicates that the sole basis of jurisdiction asserted below was the *receipt* of news by petitioner from an Associated Press wire. This petitioner, as well as other operators of small local radio stations do not furnish news back to Associated Press for transmission and use

elsewhere; the transaction between the Associated Press and the petitioner as an associate member was a one-way transaction, by teletype (Appendix 24). When the news was received by the petitioner it was not sold by him as a service or an article of commerce, but was broadcast over his station free for the purpose of attracting and holding an audience of listeners in order to make the various broadcast time periods valuable for sale to potential advertisers. The business of petitioner was the sale to advertisers of various portions of the broadcast time of station WEMR.

In furtherance of that business, the operator of a radio station utilizes the news received from the Associated Press as "window dressing" in the same manner as the operator of a retail store displays his merchandise and uses decorative materials as background, or in other ways, to embellish his displays of merchandise and attract attention. When the retail storekeeper buys such decorative or display materials for purposes of embellishment, it can hardly be argued that he is other than an ultimate consumer of those materials. By the same token, when the petitioner made use of the news received from Associated Press to "embellish" a particular portion of his broadcast time in order to attract an audience, he was in the same manner "consuming" or using up the news items he received for a purpose purely incidental to his main business.

Upon this basis, the receipt by the petitioner of news from the Associated Press was in the capacity of ultimate consumer. In that capacity and by definition under Section 3, subsections (b) and (i), the employees of the petitioner were not engaged in commerce or in the production of goods for commerce, and the Act should have been declared inapplicable.

This conclusion is supported by the decision in Phillips v. Star Overall Dry Cleaning Company, C.C.A. New York 1945; 149 F. 2d 416, certiorari denied 327 U.S. 780, re-hearing denied 327 U.S. 817, wherein it was held that the "delivery" contemplated under subsection (i) of Section 3 of the Act is one that gives the ultimate consumer the right to deal with the goods as his own while they are being consumed. Clearly, Rennekamp had the right to deal with the news which he received from the Associated Press as his own, to use or not to use the same in whole, or in part, to edit the same, to determine how often the items would be repeated over his station, and in all respects to deal with the news reports in the same manner as he could deal with any other commodity or piece of equipment purchased by him for use in his radio station . (Cf. testimony of Welsh, Appendix 24)

That Congress intended to exempt from the provisions of the Act business activities which are primarily local in character is clear from the nature of the numerous exemptions set forth in Section 13 of the Act (Appendix 18-21).

For example, the following is a partial listing of exemptions: Any employee of any retail or service establishment or establishment engaged in laundering, cleaning, or repairing clothing or fabrics more than 50% of which establishment's annual dollar volume of sales is made within the State; any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4,000 the major part of which circulation is within the county where printed and published or counties contiguous thereto; any switchboard operator employed in a public telephone exchange which has not more than 750 sta-

tions; any employee or proprietor in a retail or service establishment engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500.00 a month; any employee engaged in the delivery of newspapers to the consumer.

As pointed out by this court in the opinion of Mr. Justice Douglas in Walling v. Jacksonville Paper Company, 317 U.S. 564 (1943), 570, a case also arising under the Fair Labor Standards Act; ". . . in this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states . . .".

A similar thought was expressed by Mr. Justice Douglas speaking for this Honorable Court in Mabee v. White Plains Publishing Company, 327 U. S. 178 (1946) at page 184 where, referring to the exemption of small weekly and semi-weekly newspapers (the Act now also exempts small daily newspapers) from coverage under the Act, the opinion states that such exemption is not a "deliberate and calculated device to penalize a certain group of newspapers . . . As we have seen, it was inserted to put those papers more on a parity with other small town enterprises."

The plaintiff below, the District Court, and the Court of Appeals all rely upon the decisions in Lorain Journal v. U. S., 342 U.S. 143 (1951), Associated Press v. U.S., 326 U.S. 1 (1945), and Associated Press v. N.L.R.B. 301 U.S. 103 (1937) to sustain the applicability of the Act to the petitioner and the jurisdiction of the Federal courts. Reliance on these decisions is in error for the following reasons:

(a) In the Lorain Journal case, the question of applicability of the Fair Labor Standards Act of 1938 to a small radio station was not raised or directly involved. That was an action brought under the Sherman Anti-Trust Act to restrain improper practices by the newspaper against the interests of the radio station which was assumed to be engaged in interstate commerce and which assumption could be supported on the basis of the much greater power of the radio station involved, reaching into all or part of 20 counties and an estimated population of 450,000 as shown in the official opinion. There is no basis for comparison between the radio station in the Lorain Journal case and the small, purely local station operated by the petitioner at Emporium, Pa. Furthermore, an adjudication under one statute is not necessarily controlling in a case arising under a different statute: Brooklyn Bank v. O'Neill, 324 U.S. 697 (1945).

(b) The two Associated Press cases are not authority in the instant case for the reason that they deal with a situation and a business which is in no wise parallel to the instant case. The Associated Press cases involve the employees engaged in providing a continuous flow of news across state lines on a two-way basis. The nature of the services of the Associated Press was the furnishing of news to its member newspapers in various states and the receipt of news from the member newspapers for transmission of the same in the opposite direction to other newspaper members in other parts of the country.

There is no similarity between the situation of the direct employees of the Associated Press and the three

or four employees of the petitioner in the operation of station WEMR. The testimony produced by plaintiff disclosed that the petitioner was not a regular member of the Associated Press but was in a separate category known as an "Associate Member", involving an arrangement entirely different from that between the Associated Press and its newspaper members. The petitioner as the operator of station WEMR *received* news by teletpye under a special news service for associate members referred to as a special radio service. (Appendix 24). As already pointed out above, in receiving that service, the petitioner and operators of similar local stations throughout the country, constitute the "ultimate consumers" in the sense that said term is used in subsection (i) of Section 3 exempting from the scope of the Fair Labor Standards Act goods after their delivery into the actual physical possession of the ultimate consumer thereof.

Subsection (a) 8 of Section 13 of the Act, 29 U.S.C.A. Section 213, expressly exempts from coverage "any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4,000 the major part of which circulation is within the county where printed or published or contiguous thereto . . .". This presents the second basic question involved in this proceeding.

To construe the Fair Labor Standards Act as applicable to the petitioner would result in violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States which guarantees that "no person shall be deprived of life, liberty or property, without due process of law . . .". (Appendix 22)

In view of the absence from the Act of any specific reference to radio stations, and since the small local radio station of the petitioner was held to be covered under the Act upon the same basis as newspapers, to-wit, receipt of news from the news services and dissemination of such news, the exemption provided in the Act for small local newspapers should properly be applied to small local radio stations which are, in all significant respects, upon the same footing as the exempted newspapers. A comparison of the relative positions of the small local newspapers, expressly exempted in the Act from its coverage, and the small local radio stations presents the following points of similarity: both are media of communication; both types of business are comparable from the standpoint of limited number of employees, limited number of readers or listeners, limited area of coverage, limited effectiveness from an advertiser's viewpoint, limited gross income, and the fact that the small local radio stations compete with the small weekly, semi-weekly, or daily newspapers for advertising. In view of these realities, there would appear to be no valid legal basis for distinction between the purely local radio stations and the small weekly, semi-weekly, or daily newspapers specifically exempted in the Act from its coverage.

It should also be noted that Subsection (d) of Section 13 exempts from coverage "any employee engaged in the delivery of newspapers to the consumer". By analogy, the employees of petitioner performed that same function in their news broadcasts.

The action of the lower court in holding that the defendant and radio station WEMR were covered by the Act limited the petitioner in the exercise of his property

right in the operation of the radio station. Furthermore, if, under the injunction issued in this case, petitioner were subsequently charged with contempt of court for violation of the injunction, any punishment imposed could constitute a deprivation of his liberty. In the circumstances here present, to deny petitioner the exemption from coverage would constitute an unwarranted arbitrary and unreasonable discrimination as between him and the smaller classification of newspapers. As expressed by Mr. Chief Justice Warren in the case of Bolling et al. v. Sharpe et al., 347 U.S. 497 (1954) at page 499, ". . . But as this court has recognized, discrimination may be so unjustifiable as to be violative of due process of law . . . .".

In summary, petitioner respectfully submits that the burden of proving the applicability of the Act to him was upon the plaintiff in the lower court: Mitchell v. Joyce Agency, C.A.7, 211 F2d 241 (1954); Mitchell v. Raines, D.C., Ga., 136, F. Supp. 5 (1955); that the plaintiff below failed to meet the burden; that the cases relied upon by the lower courts as bringing petitioner within the coverage of the Act and the jurisdiction of the courts do not sustain their position; and that to hold that petitioner is covered by the Act on the same basis as newspapers without extending to him the benefit of the exemption provisions for small weekly, semi-weekly, and daily newspapers, is an unwarranted, arbitrary, and unreasonable discrimination as between him and the smaller local newspapers and deprives him of his property rights and possibly his liberty in a manner "violative of due process of law."

WHEREFORE, petitioner prays this Honorable Court to grant a Writ of Certiorari to the Court of Appeals for the Third Circuit for the purpose of bringing up the record of this proceeding, and for a review of the decision of the Court of Appeals and of the District Court upon the legal questions involved.

Signed:

KENNETH E. RENNEKAMP,
Petitioner

Signed:

DAVID R. LEVIN
KENNETH E. RENNEKAMP,
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,278

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor
v.
KENNETH E. RENNEKAMP, Individually and
Doing Business as Radio Station WEMR,
Appellant,

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: McLAUGHLIN, KALODNER and STALEY,
Circuit Judges.

Judgment

This cause came on to be heard on the record from United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

January 2, 1958

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 12,278

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

v.

KENNETH E. RENNEKAMP, Individually and Doing Business as Radio Station WEMR,
Appellant.

Appeal from the United States District Court for the Western District of Pennsylvania

Argued December 3, 1957

Before McLAUGHLIN, KALODNER and STALEY,
Circuit Judges.

Opinion of the Court.

(Filed January 2, 1958)

PER CURIAM:

In the district court the Secretary of Labor obtained an injunction against appellant restraining him from violating the minimum wage, overtime and record provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. § 201, et seq.

The record clearly shows that during the critical period appellant's radio station was an associate member of the Associated Press, had a teletype machine of that organization in its office from which it received Associated Press world and national news on a twenty-four hour a day basis for broadcast purposes and that such news was received, edited and broadcast at regular intervals every day in the week except Sunday. The em-

ployees of the station worked as announcers, engineers and announcer-engineers. Among other things they had duties in connection with the Associated Press news reports, operation and maintenance of transmission equipment, preparation of commercials and sale of advertising for the station. These facts brought appellant's employees within the coverage of the Act. Lorain Journal v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945); Associated Press v. N.L.R.B., 301 U.S. 103 (1937). There was substantial proof, accepted by the court sitting without a jury, of violations of the Act. Appellant's contention that application of the Fair Labor Standards Act to him violates the Fifth Amendment is without merit. Though the station has been closed it is conceded that appellant is still interested in at least two other radio stations. In one of these he possesses a fifty per cent partnership interest. The other is a corporation of which he is president. An injunction against violating the Act has been previously issued against the latter station.

The decision of the district court is sound and its injunction against the appellant justified.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Section 3, FAIR LABOR STANDARDS ACT OF 1938, June 25, c. 676, Section 3, 52, Stat. 1060; 1946 Reorg. Plan No. 2, Section 1, Eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; October 26, 1949, C. 736, Section 3, 63 Stat. 911; 29 U. S. C. A. Section 203.

DEFINITIONS.

. . . (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof . . . (i) "Goods" means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof . . .

Sec. 6, FAIR LABOR STANDARDS ACT OF JUNE 25, 1938, c. 676, Sec. 6, 52 Stat. 1062; June 26, 1940, c.432, Sec. 3(e), (f), 54 Stat. 616; October 26, 1949, c.736, sec. 6, 63 Stat. 912; August 12, 1955, c.867, sec. 3, 69 Stat. 711; 29 U.S.C.A. sec. 206.

MINIMUM WAGES.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than $1 an hour; . . . (other portions of this section relating to Puerto Rico or the Virgin Islands are not applicable)

Sec. 7, FAIR LABOR STANDARDS ACT OF 1938, June 25, c. 676, sec. 7, 52 Stat. 1063; October 29, 1941, c.461, 55 Stat. 756; July 20, 1949, c. 352, sec. 1, 63 Stat. 446; October 26, 1949, c.736, sec. 7, 63 Stat. 912; 29 U.S.C.A. sec. 207.

MAXIMUM HOURS.

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work week longer than 40 hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed . . . (additional portions of this section not applicable).

Sec. 13 of the FAIR LABOR STANDARDS ACT of 1938, June 25, c.676, sec. 13, 52 Stat. 1067; August 9, 1939, c.605, 53 Stat. 1266; October 26, 1949, c.736, sec. 11, 63 Stat. 917; 29 U.S.C.A. sec. 213.

* * * * * * *

EXEMPTIONS.

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean

an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: Provided, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: Provided, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reser-

voirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14 of this title; or (8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where printed and published or counties contiguous thereto; or (9) any employee of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, not included in other exemptions contained in this section; or (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has not more than seven hundred and fifty stations; or (12) any employee of an employer engaged in the business of operating taxicabs; or (13) any employee or proprietor in a retail or service establishment as defined in clause (2) of this subsection with respect to whom the provisions of sections 6 and 7 of this title would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month; or (14) any employee employed as a seaman;

or (15) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve.

(b) The provisions of section 7 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 (U.S.C.A.); or (2) any employee of an employer subject to the provisions of sections 1-27 of Title 49 (U.S.C.A.); or (3) any employee of a carrier by air subject to the provisions of sections 181-188 of Title 45 (U.S.C.A.); or (4) any employee employed in the canning of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproducts thereof; or (5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state.

(c) The provisions of section 12 of this relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, or to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(d) The provisions of sections 6, 7, and 12 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer.

AMENDMENT V TO U. S. CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

From Transcript of Testimony U. S. District Court for the Western District of Pa.

"CHARLES A. WELSH, JR., a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Weiner:

Q. What is your name?

A. Charles A. Welsh, Jr.

Q. Where do you live?

A. 5207 Lawson Road, Baldwin Borough, Pittsburgh 36.

Q. By whom are you employed?

A. The Associated Press.

Q. How long have you been employed there?

A. Since July 1st, 1942.

Q. What is your present position?

A. Correspondent in charge of the Pittsburgh Bureau of the Associated Press.

Q. How long have you held that position?

A. Since August of 1955.

Q. Could you tell us what kind of an organization the Associated Press is?

A. The Associated Press is a non-profit cooperative news gathering organization gathering news throughout the world for distribution to newspapers and radio stations, principally in the United States and other countries.

Q. Are there associate memberships in the Associated Press?

A. Yes, we have a category which we list as associate membership. I am unable to give you the technical

differentiation between associate and regular member. (PP. 66-67)

* * * * * * *

Q. Do you have what is known as a special AP radio news service wire report for broadcasting stations?

A. Yes, we do, sir.

Q. Will you explain to the Court just what that consists of?

A. The AP radio wire is a leased wire which carries news principally designed for radio broadcast; news written for radio broadcast must be prepared in a different style of writing than the news prepared for newspaper publication and in order to adequately serve radio stations, the AP set up this very separate operation which goes to radio stations and from which they can receive it in teletype copy, ready for broadcast if they choose to use it as it is received.

Q. And the teletype service, do you know whether the radio stations have ticker service, ticker machines in the stations to receive this teletype service?

A. A radio member of the Associated Press will have a teletype receiver, not a ticker—there is a difference—a teletype receiver in its station or at its broadcasting studio somewhere where the news is handled. (PP. 70-71)"

* * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1957

KENNETH E. RENNEKAMP, INDIVIDUALLY AND DOING BUSINESS AS RADIO STATION WEMR, *Petitioner*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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BESSIE MARGOLIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 882

KENNETH E. RENNEKAMP, INDIVIDUALLY AND DOING BUSINESS AS RADIO STATION WEMR, *Petitioner*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (34b-42b) and its memorandum decision on motion for a new trial (3a-5a)[1] are not officially reported. The *per curiam* opinion of the Court of Appeals (Pet. 15-16) is reported at 251 F. 2d 488.

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[1] References are to the pages of the two appendices from the Court of Appeals below, which were filed as part of the record in this Court by the petitioner.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1958 (Pet. 14). The petition for a writ of certiorari was filed on March 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether employees who operate a commercial radio station, and whose regular duties include the receiving and broadcasting of world-wide news obtained from out-of-state sources over an Associated Press teletype, are engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

2. Whether application of the Fair Labor Standards Act to petitioner's small radio station is an unreasonable discrimination violating the Fifth Amendment, because of the exemption provided in the Act for some small newspapers and certain other small businesses.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 63 Stat. 910, 29 U.S.C. 201, *et seq.*, the pertinent provisions of which are set forth at pages 17-21 of the appendix to the petition.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the minimum wage, overtime, and record-keeping requirements of the Fair Labor Standards Act of 1938, as amended, in the employment of employees operating his commercial radio

station in Emporium, Pennsylvania. These employees worked as announcers, engineers, or announcer-engineers, editing and broadcasting news reports at regular intervals throughout the day, operating and maintaining the transmission equipment, and preparing and presenting programs (36b-37b). The radio station had in its office an Associated Press teletype machine, in operation on a twenty-four hour basis, over which world-wide news, gathered by the Associated Press, was continuously received, edited, and broadcast at regular intervals by petitioner's employees (4a; 35b-37b; Pet. 15). In addition, cables, messengers and the mails were used as communications, both in receiving and transmitting news to and from the Associated Press and its membership (36b). Also, petitioner received at the station reports of football and baseball games, originating outside the State, and rebroadcast these reports (3b).

Both courts below held that the employees were engaged in commerce within the meaning of the Act, by reason of their duties in connection with the Associated Press news reports, the operation and maintenance of transmission equipment, the preparation of commercials, and the sale of advertising for the station (40b; Pet. 15-16). The trial court, finding that defendant had substantially violated the requirements of the Act (37b-39b; 4a-5a), issued an injunction against petitioner. The Court of Appeals affirmed.

In the Court of Appeals, petitioner contended that application of the Act to its radio station was an unconstitutional discrimination because certain small newspapers are exempted from the Act. The Court of Appeals regarded this claim as "without merit" (Pet. 16).

ARGUMENT

The decision below is a correct application of principles well settled by the rulings of this Court construing the coverage of the Fair Labor Standards Act, and admittedly does not conflict with holdings of any other Court of Appeals. The lack of substance in petitioner's claim of unconstitutionality has long been settled by this Court's decisions.

1. The holding that the regular receiving, editing, and broadcasting of world-wide news from out-of-state sources was sufficient to bring petitioner's employees within the coverage of the Act is plainly in accord both with the literal terms of the statutory definition of "commerce" (which expressly includes "transmission, or communication" among the several States, Section 3(b)), and with this Court's decisions in *Lorain Journal* v. *United States*, 342 U.S. 143; *Associated Press* v. *United States*, 326 U.S. 1; and *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103. The immediate "local dissemination" of such out-of-state news, to the *listening* public no less than to the "reading public," "is an inseparable part of the flow of the interstate commerce involved" (*Lorain*, 342 U.S. at 151-152). Indeed, since the transmission of news by radio broadcasting is even more "immediate" (*id.*, at 152) than its dissemination by newspapers, *a fortiori* there is that "practical continuity of movement" which is included within the scope of the "commerce" covered by the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568-569.

Further support for the decision below is found in this Court's decisions recognizing that "[b]y its very

nature broadcasting transcends state lines and is national in its scope and importance" (*Fisher's Blend Station* v. *Tax Com'n.*, 297 U.S. 650, 655), and that "[n]o state lines divide the radio waves" (*Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 279). See also *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C.A. 3), certiorari denied, 340 U.S. 929; *Station WBT* v. *Poulnot*, 46 F. 2d 671 (E.D. S. Car.); *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318 (C.A. 7); *United States* v. *Gregg*, 5 F. Supp. 848, 857 (S.D. Texas); *Whitehurst* v. *Grimes*, 21 F. 2d 787 (E.D. Ky.); *City of Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 9, 190 S.E. 594, 596-597.

2. Not only is there no conflict among the courts of appeals[2] but it has been uniformly recognized by lower courts that the Fair Labor Standards Act is applicable to radio broadcasting stations. *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C.A. 5); *Wilson* v. *Shuman*, 140 F. 2d 644 (C.A. 8); *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180, 182 (W.D. Tenn.); *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907 (N.D. Tex.); *Fleming* v. *Capital Broadcasting Co.* (not officially reported), 1 WH Cases 486, 3 Labor Cases, Para. 60,340 (M.D. Ala.); *Mitchell* v. *Monahans Broadcasters* (not officially reported), 11 WH Cases 767, 24 Labor Cases, Para. 68,090 (W.D. Tex.); *Cummins* v. *Carteret Broadcasting Company*, 137 F. Supp. 547 (E.D. N.C.). There is not a single decision to the contrary on the coverage of either newspapers

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[2] Petitioner does not assert that there is a conflict, but claims (incorrectly) that the issues in this case "have never been squarely raised in, or directly passed upon by, any Federal court prior to the present proceeding" (Pet. 4).

or radio broadcasting stations. Even where the coverage of a newspaper's employees has been contested, coverage of employees working for an affiliated broadcasting station was conceded. See *Walling* v. *Sun Publishing Co., supra,* 47 F. Supp. at 182. Apparently, the Act's applicability to radio broadcasting is so clear that it has been generally recognized and accepted without serious contest throughout the almost 20 years the Act has been in effect.

3. Petitioner's contention that the statutory exemption for certain small newspapers without a similar exemption for small radio stations constitutes "an unwarranted, arbitrary, and unreasonable discrimination" in violation of the Fifth Amendment is conclusively answered by this Court's decision in *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178. There, the virtually identical contention—that the exemption for small newspapers (which at that time excepted only certain weeklies or semiweeklies) unreasonably discriminated against small *dailies*—was summarily dismissed by this Court with the comment (327 U.S. at 184): "The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field [citing] *Steward Machine Co.* v. *Davis,* 301 U.S. 548; *Currin* v. *Wallace,* 306 U.S. 1, 13-14."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STUART ROTHMAN,
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